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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~696~~ 55

RAILWAY EXPRESS AGENCY, INC., APPELLANT,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED FEBRUARY 27, 1930

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IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

In the Matter of the Application of the Railway Express Agency, Incorporated, for a Permit to Do a General Express Business in the State of Virginia

Petition for Appeal and Order Allowing Same

To the Honorable the Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

The Railway Express Agency, Incorporated, a corporation incorporated under the laws of the State of Delaware on December 7, 1928, to carry on the express transportation business, applied to the State Corporation Commission for a certificate of authority to do business in this State as such express company under Chapter 158 of the Code of 1919 and under Sections 3845 and 3847 of that Code. An informal application was made to the State Corporation Commission on January 25, 1929, for such certificate, but the papers were returned and the application refused in a letter dated January 28, 1929, from the Chairman of the Commission, Honorable Louis S. Epes. In his letter, he stated that this agency could not exercise any of its public service functions in Virginia, certainly so far as those functions were to be exercised in intrastate commerce.

Thereupon, on March 4, 1929, the application was formally renewed before the Commission and evidence taken on its right to be granted a certificate to do business in this State. Your petitioner is aggrieved by the entry of a final order of the State Corporation Commission on April 8, 1929, refusing a certificate of authority to your petitioner to do an intrastate express business in Virginia; without prejudice, however, to the right of the Railway Express Agency, Incorporated, to engage in interstate commerce in [fol. 2] Virginia, without having received a certificate of authority to do business in Virginia under Section 3847 of the Code (R., p. 237). This order was entered by the Commission, notwithstanding the admitted fact that all formal-

ities required by law applicable to the granting of a certificate of authority to do business in this State had been complied with by said Agency. (R., p. 3.)

The transcript of the record in this matter is filed herewith as a part of this petition.

Statement of Facts

As shown by the certificate of incorporation, the nature of the business and the objects and purposes to be transacted and carried on by the Railway Express Agency are as agent or otherwise to engage in and conduct in all of the States of the United States, etc., the express transportation business.

In reply to the position that this Railway Express Agency is clearly shown to be a mere agent of the railroads themselves to conduct their own express business over their own lines or routes, and that the ownership of the shares of stock in said agency is limited to railroad corporations, the Commission, in its opinion, states no such provisions are to be found in the charter of the Company. (R., pp. 241-42.) This is an error of fact on the part of the Commission. The fourth section of the certificate of incorporation of the said Agency provides that the total number of shares of stock authorized is one thousand, which shares are without nominal or par value. That section goes on to say:

"The holder of any share or shares of stock of the corporation shall not sell, transfer or otherwise dispose of the same (other than to a successor corporation by consolidation, merger or purchase), without first offering such share or shares to the corporation for purchase at the price at which such shares were issued.

The subscription, purchase or other acquisition and the holding and ownership of shares of stock of this corporation shall, as far as may be lawful, be limited to railroad corporations." (R., p. 10.)

That the character of your petitioner is that of a mere agent of the railroads, and not that of an independent public service corporation (merely because it is technically a separate legal entity), is conclusively established by the

[fol. 3] form of agreement between the said Agency and each railroad company over whose line it operates and the other papers filed as a part of this record. Thus said agreement (R., p. 68) in its opening paragraph states as follows:

"Whereas the rail company has united with other carriers operating railroads in the continental United States to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business; and

Whereas, the express company has been organized as the joint express agency or facility of the railroad company and other carriers uniting as aforesaid, all of which have undertaken to enter into agreement with the express company identical herewith." (R., pp. 68-69.)

The opinion of the Commission (R., p. 242) also quotes from Section 1, Article II, of this Agreement, which is as follows:

"Article II, Section 1. The railroad company hereby constitutes and appoints the express company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased and operated by the Rail Company and (b) for the collection and disbursement and division under this agreement of all revenues accruing under this agreement. * * *." (R., p. 70.)

In its opinion, the Commission states that it will assume that this agreement has been executed by all railroads operating in Virginia, though it does not affirmatively appear from the record that it has been actually executed by any railroad company or the Railway Express Agency, Incorporated. (R., p. 242.) A list of the eighty-six railroads constituting the owners of the lines that have created the Railway Express Agency as their instrumentality for

carrying on their express transportation over all their lines [fol. 4] is in the record of this case. (R., p. 41 to 43.) In its application and plea for a certificate to do business in Virginia, the Railway Express Agency sets out that nearly ninety-eight per cent of the gross express business of the whole country is done by these eighty-six railroads; and that all of them had signed the operating agreement. (R., p. 103.)

In the opinion of the Commission (R., p. 242), it is said:

"It appears from the report of the Interstate Commerce Commission, Finance Docket 73221 filed in these proceedings by the applicant that all the Class I railroads operating in Virginia will be entitled to purchase one or more shares of stock in the Railway Express Agency, Incorporated; but that none of the Virginia railroads smaller than a Class I railroad will be entitled to become stockholders."

This is fully explained in the plan for future conduct of express business (R., p. 22), where it is said:

"The participation in this plan is limited to the members of the association of railroad executives named in the table attached to Exhibit A, because of the impracticability of joining the very large number of other roads which perform in the aggregate only about two per cent of the gross express business transacted under the uniform contract with the American Railway Express Company."

As is found by the Interstate Commerce Commission and is set out in the plan for the conduct of the express business, these short line railroads are to share in any benefit to be derived from the conduct of the express business by the railroad controlled agency upon the same terms and condition as the participating railroads. (R., pp. 19, 25, 28 and 31.)

Petitioner Is the Joint Agency of the Participating Railroads

In seeking to reply to the argument that this Railway Express Agency is, as shown above, merely a joint facility of the railroads to carry on their own express transporta-

tion and that such agency is only adopted for the purpose of facilitating such express business, the Commission says: "In other words that the certificate should as a matter of [fol. 5] law be deemed to be issued to the stockholders of the Railway Express Agency, though in fact issued to the Railway Express Agency itself". It then draws the remarkable conclusion that the effect would be to give authority to do an intrastate business in Virginia to a large number of foreign railroads, such as the New York Central Railroad, the Illinois Central Railroad and the Erie Railroad. Of course, it is impossible for these foreign railroad corporations to do intrastate business in Virginia, as all lines in Virginia are operated under Virginia charters with the possible exception of the Louisville & Nashville Railroad. The only effect of granting this authority to do intrastate business in Virginia is to grant it to those Virginia railroads and to no others. These Virginia railroads alone would carry the intrastate business done in Virginia, as they alone own lines over which the Railway Express Agency, by contract, would have the right to carry on both intrastate and interstate express transportation. To imagine that by granting this certificate of authority to a joint agency of these railroads the effect would be to enable foreign railroad corporations to do an intrastate business in Virginia is, with all due respect, to set up a man of straw and then proceed to demolish it. This is because the learned Commissioner confuses the different lines of railroad over which the express matter must pass in interstate commerce with the transaction itself. If the shipment originates with the New York Central Railroad or the Illinois Central Railroad, the transaction is one of interstate (not intrastate) commerce, notwithstanding a part of the shipping is done over Virginia lines. This does not make it an intrastate shipment or allow those foreign railroads to do an intrastate business in Virginia. "Whatever may be the instrumentalities by which the transportation from one state to another may be effected, it is but one voyage as much so as that of a steamboat on the Mississippi river."

Wabash & P. Ry. Co. vs. Illinois, 118 U. S. 557, 30 L. Ed. 244.

Southern Express Co. vs. Goldberg, 101 Va. at pp. 623-34.

What we are contending for is that the granting of a certificate of authority to do business in this State to this Agency is merely granting authority to the railroads incorporated in this State, in conjunction with the other roads of the country, to do an intrastate and interstate express business just as these same Virginia corporations [fol. 6] are now carrying freight whether interstate or intrastate. These railroads will do their own express business on their own lines not by an independent public service corporation, but notwithstanding the fiction of its being a legal entity, by an agency created by themselves as a mere joint instrumentality or facility for doing in Virginia a general express business, both interstate and intrastate. These Virginia railroads are doing this business of both characters in regard to freight, and there is no reason why they should not, as they now desire to do, carry on their own express business.

Much is made in the opinion of the Commission (R., p. 270) of the fact that the railroads operating under Virginia charters own only two hundred and fifty shares of the thousand shares of this Express Agency. And it is said that the control of Virginia intrastate express operations by *the Virginia railroads will* not be vested in the railroad companies now operating in Virginia. As we have already pointed out, only railroads with lines in Virginia can do an intrastate business. Besides, the proceeds of such operation will, by the express terms of the Agreement made by each of these railroads with the Railway Express Agency, after the payment of proper expenses, go to the railroad itself. No dividends are to be declared on the thousand shares of non-par stock (R., p. 25), but the net revenue will be paid over to the participating railroads upon the basis of gross revenue for each company in proportion to the total gross revenue. (R., pp. 77, 84-85.) The earnings remaining after accounting for all items of income and deductions therefrom, will be designated "rail transportation revenue" and paid to the carriers within specified groups as they are entitled to receive it. By the plan for the conduct of future express business, it is distinctly provided "that whilst the distribution of the shares conforms as closely as practicable to the percentages of gross express business done by the

railroads in the past, the distribution of the stock shall not affect the distribution of earnings from the express business, which will be distributed under and in accordance with the operating contract and not as dividend." (R., p. 25, pages 84-85.) In short, the Agency relationship is established not by stock ownership, but by the operating agreement executed between the particular railroad and the Railway Express Agency. (R., p. 28.) The very object of the new operating agreement is to make the several railroads, parties to it, common carriers of express shipments and principals, in this respect, operating in the name of their common agent, the new express company. [fol. 7] The express company will be in effect the joint facility agency which, after deductions required for expenses and other charges, will distribute all revenue received, in accordance with the operating Agreement made by each railroad with the Agency. This change in the relationship of the railroads to the express business has long been advocated by the members of the Interstate Commerce Commission, and which by its recent decision in regard to the Railway Express Agency it finds has been accomplished. (R., p. 31.)

The opinion of the Virginia Commission on this point concludes with the statement "but even were all the stock in the Railway Express Agency owned by railroads which are either incorporated in Virginia or have lines extending across the boundary of the Commonwealth when the Constitution went into effect, we think that this position of the applicant should not be sustained; for there is no such identity between the Railway Express Agency, Incorporated, and its several stockholders as would warrant this Commission in disregarding legal entity of the Railway Express Agency, Incorporated * * *." (R., p. 271.)

Exactly the contrary is held by the Interstate Commerce Commission. Its opinion was delivered on February 19, 1929, and a copy is filed with this record (R., p. 213), to which, as we have no doubt, great weight will be attached, as it is the one body whose opinion on this question would seem to be conclusive. This question has also been passed upon by the United States Comptroller General, J. R. McCarl. (R., p. 234.) His reasons are that under the carrying of express matter by this Agency, the Agency is di-

rectly and exclusively under the control of the railroads and in the final analysis it is operating the express business for the benefit of the railroads. There appears, says he, to be no question but that the Railway Express Agency, Incorporated, is merely an instrumentality or adjunct, not only of the participating railroads, but of all railroads taking advantage of the new agency. He concludes that under these conditions the corporate entity of the Express Agency should be disregarded and that the express service should be held to be performed by the railroads themselves instead of through the agency of the Express Company.

The effect of the ruling was that whereas for 50 years prior to 1929 the Government had adopted the view that express shipments handled over land-grant railroads were not subject to land-grant deductions because they were [fol. 8] carried by an independent express carrier, the Government now rules that by reason of the change in the status of the express company and its existence today merely as an instrumentality or joint facility of the rail lines who are now themselves actually engaged in the express business, express traffic handled over land-grant railroads is, subsequent to March 1, 1929, the date upon which the new arrangement became effective, subject to land-grant deductions. This ruling was rendered March 12, 1929.

The opinion cites: 34 Op. Atty. Gen. 353; in re Watertown Paper Co., 169 Fed. 252; Chicago Mill Etc. Co. vs. Boatman's Bank, 234 Fed. 41; Hunter vs. Baker Etc. Co., 235 Fed. 1006; Clere Clothing Co. vs. Union Etc. Bank, 224 Fed. 363; Jos. R. Foard Co. vs. Md., 219 Fed. 827. See also American Chain Co. vs. Stewart Warner Etc. Corp., D. C. Southern D. of N. Y. Feb. 23, 1929. (R., p. 235.)

Under these circumstances, we submit that the granting of a certificate of authority to do business in the State of Virginia to the Railway Express Agency, Incorporated, will not be granting such certificate to an independent public service corporation, but will be simply the granting to the railroads themselves the right to carry on their own express business; the granting of such right to the Virginia corporations chartered under the laws of this State will be the right to carry on their own intrastate

express business and to carry on in connection with the foreign railroad companies an interstate express business for the whole country. This tribunal, as has every other tribunal which has passed upon the question, will recognize that though the Railway Express Agency is incorporated and, therefore, a legal entity, such entity is a mere fiction of law employed as the only practical method by which to transact both interstate and intrastate express business over all the railroads of the whole country. The Court will disregard the legal form and recognize that the permit to do business in this State is really to grant to a mere collection or association of railroads, the exclusive owners of this Agency and holders of all its stock, the authority to do their own express business as they now conduct their own freight business.

1 Cook on Corp. (6th Ed.), pages 31-32.
Anthony vs. Am. Glucose Co., 146 N. Y. 407.
1 Machem Mod. Law of Corp., Sec. 3, page 4; Id., page 17, Sec. 19.
1 Clarke & M. on Corp., pages 2, 3 and 18.

[fol. 9] The point which we are now presenting is fully sustained by Mr. Fletcher, in his work on Corporations, where he says:

"The legal fiction of distinct corporate existence may also be disregarded in a case where a corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality, conduit or adjunct of another corporation."

Fletcher Cyc. Corp., Vol. I, Sec. 45, and authorities cited.

The above principle is usually applied in cases of fraud or where the agent is not financially responsible and it becomes necessary to hold the principal liable. But it is a general principle to be applied whenever it is necessary or proper to be applied. In the opinion of the Interstate Commerce Commission, this is a proper case in which to apply it. Control of Railway Express Agency, Inc., 150 I. C. 432. This public service corporation is designed, exclusively owned and absolutely controlled by the railroads themselves. It has no other object than to serve as

a railroad controlled agency or joint facility by which to conduct their express business. Those roads that are Virginia corporations are already authorized to do intrastate express business, and to require their Agency to take out a Virginia charter for that purpose would be as unnecessary as it would be illegal. We submit that the requirements set out in Chapter 158 and in Sections 3845 and 3847 of the Code of 1919 are applicable to such Agency and it should be granted a certificate of authority to do business in this State.

The Case of Chicago, etc., R. R. Co. vs. Minn. C. & C. Asso.

A case which bears most convincingly upon the conclusion set forth is the case of Chicago etc. Railroad Company vs. Minn. Commerce Asso., 247 U. S. 490. In that case, two lines of railroad controlled and operated a third railroad corporation, termed the Eastern Railway. The tracks of this third company were mere switching or terminal facilities in the City of Minneapolis of the other two railroads, the Milwaukee Co. and the Omaha Co. It seems that there was a charge of $1.50 per car for inbound shipments over either the Milwaukee or Omaha lines, which were delivered over the Eastern Company's tracks and this charge was attacked before the Railroad Commission [fol. 10] of the State of Minnesota. The prayer of the petition asked that the Milwaukee Co. and the Omaha Co. be required to treat the tracks of the Eastern Company as a part of the terminal system of those two railroads, notwithstanding the Eastern Company was an independent railroad company and had filed tariffs with the Interstate Commerce Commission and with the Minnesota Commission. The Commission found that in reality and fact the tracks of the Eastern Company, notwithstanding it had a charter as an independent railroad company, were a part of the terminal facilities of the Milwaukee and Omaha Companies. This decision was carried through all the Courts of Minnesota and was finally appealed to the Supreme Court of the United States. In an unanimous opinion that Court said that the question presented for decision was whether the Eastern Company in the form of a corporate entity separate and distinct from the Mil-

waukee and Omaha Companies is in reality an independent carrier exercising an independent control over the railroad to which it holds the legal title and over the conduct of its business affairs; or whether it was a mere agency or instrumentality of the two corporations which owned all of its capital stock.

After stating that ownership alone of the capital stock in one corporation by another did not render a stock holding company the owner of the property of the other or create the relation of principal and agent, it was pointed out that the Court had plainly and repeatedly held that the above principle was not applicable where stock ownership was not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies.

U. S. vs. Lehigh Val. R. Co., 220 U. S. 257, 273, 55 L. Ed. 458, 463.

U. S. vs. Delaware L. & W. Railroad Co., 238 U. S. 516, 59 L. Ed., page 1438.

In such a case, says that great tribunal, the Courts will not permit themselves to be blinded or deceived by mere form of law, but regardless of fictions will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require. The Court added:

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company [fol. 11] and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it * * *." Chicago M. & St. P. R. Co. vs. Minn. C. & C. Asso., 247 U. S. at p. 497, 62 L. Ed. at p. 1236.

In the instant case, these railroads are the exclusive owners of all the stock of the Railway Express Agency, Inc. Such ownership is not for the mere purpose of participating

in the affairs of this agency in the normal and usual manner, but is for the purpose of controlling this subsidiary company as a mere joint facility and instrumentality of the owning companies. In such a case, the Court will deal with the substance of the matter involved, as if the corporate agency did not exist. It will, we respectfully submit, hold that in granting the right or permit to do business in this State to this agency, it is merely granting the right to the railroads creating this Agency to carry on their express business, both interstate and intrastate, over their own lines, as now the same railroads carry freight, intrastate and interstate.

The True Meaning of the Enactment of Chapter 158

In refusing this certificate to your petitioner, the Commission seeks to confine the language of Chapter VII of "An act concerning public service corporations," which is now Chapter 158 of the Code, to the three express companies doing business in 1904 in this State—the United States Express Company, the Adams Express Company and the Southern Express Company. The mere reading of Chapter 158 makes it clear that the language of that chapter applies not only to the then existing express companies but to any foreign express company that might thereafter seek to do business in this State. It prescribes that any foreign express company shall do a general express business upon conforming to the provisions of chapter 158 and to Sections 3845 and 3847. If the Legislature had deemed it necessary for such express company to get out a Virginia charter in order to do intrastate business, then it is evident Chapter 158 would never have been enacted. That Chapter makes no distinction between intrastate an- interstate business, nor does it limit the foreign express company to the doing of interstate express trans- [fol. 12] portation. It is only where the foreign express company is authorized to do intrastate express business that the proviso as to making the Secretary of the Commonwealth its statutory agent is necessary in order to have proper service of process in suits against the foreign express company by citizens of this State. In the same way, the proviso requiring a deposit of bonds could only be law-

ful where the foreign corporation is carrying on intrastate express business and the citizens of this State need or might need such protection, provided further such protection could be consti-tionally required.

Previous Decisions of the Commission

Besides, as shown more fully hereafter, the opinion seeks to minimize, if not ignore, its own decisions as to the right of a foreign express company to have granted it a certificate to do business in Virginia. Since 1902 there have been three and only three such applications. In 1914 Wells-Fargo & Company took over the business of the United States Express Company in this and other states. A certificate was denied it to do an intrastate business in this Commonwealth, but, as we understand, it was allowed down to 1918 to do both intrastate and interstate business mainly because the former was so small as to be negligible.

Until 1918 Wells-Fargo & Company, the Southern Express Company and the Adams Express Company, all foreign corporations, were doing express transportation of every kind in this State. At that time, the Director General of Railroads refused to allow them and other existing express companies to continue to do an express business. At his instance, these companies organized one company, the American Railway Express Company. After that none of these old companies could do any express business. The express business of the whole country was thereafter required to be done by the American Railway Express Company, a corporation incorporated by the State of Delaware. The learned Chairman of the Commission is in error in saying that one of them had "potential power" (whatever that may mean) to do a general express business in 1929. On the contrary, all of these old express companies were put out of business by the Federal authorities and never have done any express business since July 1, 1918.

The American Railway Express Company applied on July 28, 1918, for a certificate of authority to do a general [fol. 13] express business in this State. The right was granted and that Company has continued to do both an intrastate and interstate express business down to the present time. No suggestion has ever come from the State Cor-

poration Commission that in order to do intrastate business, it would have to take out a domestic charter.

It is said in the opinion that there is no record of the reasons upon which the Commission acted in granting this certificate. The reasonable, if not the only, conclusion is that the right to the certificate was so clear that no "reasons" were necessary. No member of the present commission was a member of the commission at that time, but that fact does not prevent the learned chairman from indulging in suppositions. The opinion states that on January (July is meant) 1, 1918, the Federal Government had assumed control of all express companies and was on July 26, 1918, operating the American Railway Express Company as a Federal agency through the Director General of Railroads. The fact is that the Federal Government did not assume formal control of the American Railway Express Company until some months after it had received a certificate to do business in this State, namely, on Nov. 18, 1918. See the Proclamation of the President of the United States of that date, of which this Court will take judicial notice.

The other foreign express corporation is the Southeastern Express Company, an Alabama corporation, which was granted a certificate of authority to do business in this State in 1921.

The conclusiveness of these two grants upon the right of your petitioner to be granted a permit to do business in this State will be considered hereafter.

Section 163 of the Virginia Constitution of 1902

Assuming, for the sake of argument, and only for the sake of argument, that the Railway Express Agency, Incorporated, is not a mere joint facility or agent of the participating railroads, but is an independent public service corporation, as is held in the opinion of the Commission, we pass now to a discussion of the reasons for the refusal by the Commission of a certificate of authority to do business in this State based chiefly, if not entirely, upon a construction of the language of Section 163 of the Constitution. Section 163 of the Constitution reads:

[fol. 14] "No foreign corporation shall be authorized to carry on in this State the business or to exercise any of the

powers or functions of a public service corporation * * *. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; * * *."

In the first place, it will be noted that if the contention of the learned Commissioner as to the proper construction of Section 163 be correct, still this does not affect the right of the Railway Express Agency to be granted the certificate to do business in Virginia. If Section 163 is to be construed to read as follows: "But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth when this Constitution goes into effect" this would not justify a refusal to the Railway Express Agency to be granted such certificate. It is, even under this construction, the lines or routes which must extend across the boundary of this Commonwealth when this Constitution goes into effect. Section 163 does not say anything as to when such public service corporation should have been chartered, but gives the authority to "any" public service corporation provided the line or route extends, etc. We repeat, it is only the line or route which must extend at that time. If the line or route did extend across the boundary of this Commonwealth in 1902, then such line or route can be used by any public service corporation, whether as the owner thereof or under contract irrespective of the date on which such public service corporation itself was incorporated. The line or route alone, under this construction, must have extended across the State in 1902. If the pub-ic service corporation uses or operates over a line or route which, at the time of the adoption of the Constitution, did so extend, then Section 163 does not apply notwithstanding the public service corporation itself was incorporated after the Constitution of 1902. The Railway Express Agency is certainly a public service corporation operating on lines or routes which extended across the boundary of this Commonwealth at the time of the adoption of the Constitution.

The language of the Constitution is not as the Commis-

sion seems to think. "This section shall not effect any public service corporation who is the owner of a line or [fol. 15] route which extends, &c." It does not require the public service corporation to be the absolute owner of such a line. It is sufficient if the line or route which, by agreement, it operates and uses, is one that extends across the boundary of the State in 1902. The line or route of your petitioner is by agreement with each of these Virginia railroads such a line or route even under the construction of section 163 of the Constitution made by the Commission. Besides, as we have seen, your petitioner is simply the joint agency of these railroads, owners of lines or routes that extended beyond the boundary of the Commonwealth in 1902.

Thus it was provided in the Acts of 1902-3-4, p. 999 (section 4033 of the Code of 1919) as follows:

"Whenever any corpar-tion * * * shall obtain from a railroad * * * of this State the right or privilege of transporting in or upon any train run upon or over the railroad of such company * * * any articles or things for the purpose of receiving compensation for the same, the said corporation shall receive and deliver any and all such articles and things offered for transportation as are contemplated by and embraced in such contract at any and all the stations on the line or route covered by such contract at which such railroad keeps an agent and receives and discharges freight and passengers."

In other words, the Legislature knew at the time of the above enactment that express companies had no line or route of their own, but that their business was necessarily done over the lines or routes of the railroads which the express companies had contracted to use for express business.

It was doubtless for this reason, among others, that the Legislature was of opinion that express companies were, like the railroads themselves, to be included in the exception contained in Section 163 of the Constitution, hence the enactment of what is now Chapter 158. Although it was incorporated subsequent to the Constitution of 1902 and had contracted after that date for the right and privilege of transporting express matter, yet, as the lines or routes covered by its contract extended across the boundary of the

Commonwealth when that Constitution went into effect, even under the construction put upon Section 163 by the Commission, section 163 does not apply to such foreign express company.

We find that all the roads which the Railway Express Agency will, by contract, use for the purpose of doing a general express business, are, by the evidence of Mr. Norman Call, Vice-President of the R. F. & P. Railroad, lines [fol. 16] that crossed the boundary of this State in 1902, except the Virginian Railway and the Clinchfield Railroad. (R., p. 132.) See concluding statement of this witness, as well as his entire testimony on this point. The testimony of Mr. Weaver is to the effect that, basing his calculation on figures of the American Railway Express Company for the year 1928, these two railroads did less than 2 per cent of the intrastate business in Virginia; and that the amount of interstate and intrastate business done by these two railroads would be negligible as compared to the total amount of interstate and intrastate business done in this State, being less than one per cent. (R., p. 138.) Besides, the Virginian railroad built in 1904 is a Virginia corporation, whilst the line of the Clinchfield Railroad in Virginia was built and operated under a Virginia charter, though the system is now owned and operated by the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad jointly. (R., p. 131.)

"When This Constitution Goes Into Effect" Not Applicable

The opinion however maintains that the clause "when this Constitution goes into effect" limits not only "such lawful business as it may be actually engaged in within this State," but also "any public service corporation whose line or route extends across the boundary of this Commonwealth." (R., p. 247.)

This is based upon the punctuation of the sentence which contains these exceptions. It is claimed that the comma before "when this Constitution goes into effect" justifies the Commission in holding that that clause applies to public service corporations whose line or route extend across the boundary of this Commonwealth.

But punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; the court or tribunal should look at the whole of the language in order to ascertain its true meaning. If that was apparent on judicially considering the whole language its punctuation will not be sufficient to change it.

Johnson vs. McCoy, 112 Va. 580 at page 583.

The above case was the case of a deed, but the same rule applies to a statute or Constitution.

Withers' case, 109 Va. 937, at page 840.

[fol. 17] In the next place, if the question is to turn upon punctuation, it will be noticed that a comma is after the word "Commonwealth" which serves to cut the first part off from the rest of the sentence. But it is not necessary in order to meet the position of the learned Commissioner to rely upon commas and punctuation.

It seems to us that the language itself shows that "public service corporations whose route or line extends across the boundary of this Commonwealth" are not confined to those whose lines were so extended "when this Constitution goes into effect". The language is disjunctive. It first refers to such public service corporations, and states that Section 163 is not to apply to them. It then goes on to say "nor (shall this section) prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect. The language is not only disjunctive, but that clause of Section 163 treats of two distinct classes. There is no connection between the one and the other. As to the first, public service corporations whose line or route extends, etc., the section is not to apply; as to the other, "any foreign corporation", the section is not to prevent it, if doing business in this State when the Constitution goes into effect, from continuing in the same. It is evident, therefore, that the sentence treats of two different classes. The second class is "any foreign corporation" other than a public service corporation whose line or route extends across the boundaries of this State. These foreign corporations are affected by the section, unless they were engaged in lawful business within this State when this Constitution went into effect. It cannot be said that this dis-

tinction between public service corporations and any foreign corporation by the Constitutional Convention was not intended. Constitutions are not made carelessly or without regard to the meaning of words. If it can be said that the first part of the clause was intended to include only such public service corporations as at the time of the adoption of the Constitution had lines or routes extending across the limits of the Commonwealth, such construction makes the first part of the sentence superfluous. Such public service corporations would be included in the latter part of the clause. A foreign public service corporation is certainly a foreign corporation. And the words "any foreign corporation" would include public service corporations which were engaged in lawful business at the time of the adoption of the Constitution. Hence, if the view of the Commission as to the construction of this language is correct, then it is [fol. 18] evident that the sentence "But this action shall not affect any public service corporation whose line or route extends across the boundaries of this Commonwealth", if confined to the time of the adoption of the Constitution is unnecessary. Public service corporations that were engaged at the time of the adoption of the Constitution in lawful business would also be allowed to continue therein.

Now, it is a first rule of construction of statutes and particularly of Constitutions that effect must be given to every word. Effect can only be given to the first part of the sentence by holding that it applies to a public service corporation whose line or route extends across the boundary of the State at the time of the application to do business in this State as well as to one whose line extended, etc., at the time of the adoption of the Constitution. In either case, Section 163 does not apply, and the foreign public service corporation may be authorized to do business in this State without being required to be chartered by the State. As shown later, the Commission's construction of Section 163 would make that section unconstitutional as opposed to the fourteenth amendment of the Federal Constitution.

It is only required to become incorporated under the laws of this State, where it seeks authority to acquire, etc., within this State any public or municipal franchise in addition to such as it may own and operate when the Constitu-

tion went into effect. No such public franchise is asked or could be exercised by your petitioner.

In the hearing before the Commission, your petitioner submitted that the proper reading of this section shows that the comma after the words "Commonwealth" is as if there had been a full stop. This was the case when the section was reported from the committee to the Constitutional Convention. See Debates of Constitutional Convention, Vol. 2, page 2810. It was only changed to a comma when there was added the disjunctive proposition: "Nor prevent any foreign corporation from continuing in business, if it was doing such business when the Constitution went into effect." The learned Chairman of the Commission states that we fell into an error by reason of the inaccuracy of the report. He refers to the Journal and Documents of the Constitutional Convention as showing a different wording and punctuation of the above quoted clause. With the utmost respect for the learned Commissioner, we think he has confused the punctuation of Section 163, as originally reported by the committee to the Convention, with that as finally adopted, after the Convention had incorporated the above clause.

[fol. 19] "Mr. Braxton: If I am not mistaken—and if I am I should like to be corrected by the gentleman from Wise—the Louisville and Nashville road crosses the State line and Section 12 says:

But this section shall not effect public service corporations whose line or route extends across the boundary of this Commonwealth. But any such foreign service corporation so engaged shall not be authorized to hereafter acquire, lease, use or operate within this State any public or municipal franchise in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

The discussion at that time was upon the report of the Committee on Corporations as amended by that committee and not as finally amended by the Convention itself. The quotation from Section 12, as made by Mr. Braxton, the Chairman of the Committee on Corporations, was in the Debates of March 3, 1902, but the report of the committee on corporations including section 12 was not finally adopted until the next day, March 4, 1902. On motion of Mr.

Braxton, the report of the Committee on Corporations, as amended and adopted by the Convention was ordered to be printed, etc. See Journal, etc., of the Constitutional Convention 1902, page 437. Section 12 as quoted by the learned Commissioner (R., p. 250) is from a copy of the report as finally amended and adopted by the Convention, and is filed as an Exhibit with the Journal. At that time, the sentence in regard to public service corporations had a comma at the end because of the addition to the clause of the disjunctive proposition above quoted.

The conclusion is irresistible that where the public service corporation owns or uses lines that extend, at the time of the application, across the boundary of the Commonwealth, it is not required to incorporate in Virginia. "But if they seek to extend their lines, especially if they use the right of eminent domain in order to do so, they must take out a domestic charter for that purpose."

Debates of the Constitutional Convention, page 2811.

The very quotations made by the learned Commissioner in his opinion (R., pp. 250-252) show that the real contest as to this section of the Constitution was to provide that no foreign railroad company should build lines, either main or branch, without first becoming a domestic corporation. [fol. 20] In order to do such building, the sovereign right of eminent domain would have to be exercised and the Convention would not permit the exercise of this public franchise by a foreign corporation. It was particularly aimed at the B. & O. Railroad Co. and the Louisville & Nashville Railroad Company.

See Dissenting Opinion in Standard Oil Co. vs. Commonwealth, 104 Va., at page 692.

Construction of the Statutes Allowing Foreign Express Companies to Do Business in Virginia

We submit that an examination of these statutes and their history is conclusive upon the right of the Railway Express Agency, Inc., to be allowed the certificate applied for. The earliest statute in regard to express transportation over the railroads of the Commonwealth was passed April 24, 1867, and will be found in the Acts of Assembly 1866-67, page 893. It is at least persuasive when we find

that that early act in one aspect at least allowed railroad companies to do exactly the business which the Railway Express Agency, Inc., will, if permitted, do in this Commonwealth. It began by saying: "That is shall be lawful for any railroad in this Commonwealth to transport and carry by or upon the passenger trains of such railroads upon its own account or in conjunction with any other railroad or steamboat company express matter." Your petitioner as a railroad controlled agency now asks on behalf of these railroads to do exactly the same express transportation business.

This act was carried into the Code of 1887 as sections 1215 and 1216 of that Code and continued to be the law down to 1904.

When the Constitution of 1902 was adopted, the Legislature immediately met for the purpose of adapting the statute law of the State to the new Constitution. Several members of this legislative body had been members of the Constitutional Convention. The Legislature enacted what is known as "Act concerning public service corporations", approved January 18, 1904. Chapter VII of that Act covered the subject of express companies.

Acts of 1902-3-4, page 997.

This Legislature did not deem Section 163 of the Constitution applicable to foreign express companies so as to re-[fol. 21] quire such companies to take out a Virginia charter. It allows foreign express companies to do both intrastate and interstate business by appointing one of their officers or agents residing in this State their statutory agent for the service of process. It further required that each of these foreign express companies should deposit in the Treasury of Virginia a certain amount of bonds. Hence, by a contemporaneous construction of the Constitution of 1902, Section 163 of that Constitution was held not to apply to foreign express companies as is now contended. Foreign express companies could do a general express business without taking out a domestic charter. It had simply to conform to the requirements of Chapter 158.

As we have seen, the three express companies that were doing business in Virginia in 1918 were put out of business by the Federal Government and not allowed to do there-

after any express business. The American Railway Express Company was the only company allowed to do express business. In that year, the Code of 1887 was revised. In the opinion of the Commission (R., p. 268) it is said that as a matter of law neither the revisors of the Code nor the Legislature was chargeable with knowledge that these foreign express companies had withdrawn from the State never to return. On the contrary, every citizen and court as well as the revisors were charged with notice of the proclamation of the President. Notwithstanding the opinion of the Commission, it must be conclusively presumed that the revisors did know, at the time of such revision and adoption of the Code of 1919, there was only one express company doing a general express business not only in this Commonwealth but in the whole Country. Yet, notwithstanding that knowledge, the revisors continued Chapter VII of the act approved January 18, 1904, as Chapter 158 of the Code of 1919. That chapter, therefore, not only referred to the then operating express company, but as its language plainly shows, referred to any foreign express company who in the future desired to do a general express business in this State. These revisors did not require that such foreign express companies should take out a charter under the laws of this State, but simply to obtain a certificate to do business in this State as had hitherto been decided by the Commission in the case of the American Railway Express Company. Certainly, in view of these facts, the revisors would not have re-enacted the Act of January 18, 1904, if it had been thought that Section 163 of the Constitution applied and required foreign express [fol. 22] companies to be chartered under the laws of Virginia in order to do an intrastate express business.

We submit that these acts of the Legislature and of the revisors give overwhelming weight to our contention. They show that the present Commission is in error in refusing to grant your petitioner a certificate, and that, in the view of these legislative bodies, your petitioner is within the exception set out in Section 163.

To Hold with the Commission is to Declare Chapter 158 Unconstitutional

Before passing from the consideration of these various acts and especially of Chapter 158 of the Code, we desire

to call attention to what would be the effect upon this Chapter and these Acts if it should now be held that this foreign express company should not be granted a certificate to do business. The necessary effect would be to declare these acts and this chapter unconstitutional as opposed to Section 163. Either Chapter 158 is legal and under it your petitioner is entitled to the certificate prayed for or else these acts, being opposed to Section 163 as contended by the Commission, are unconstitutional. No one but will admit that these repeated acts of the Legislature from 1904 down to the present time enacting and re-enacting Chapter 158, makes this question of its constitutionality at least a very doubtful one. Authority is not needed for the proposition that only the most strong and convincing reasons can justify the position that their enactment was an unconstitutional exercise of legislative power as being contrary to the provisions of Section 163. In such a case, to doubt is to be resolved—in favor of the constitutionality of these acts and of the right of this foreign express company to be granted this certificate to do business in this State by conforming to Chapter 158 and Sections 3845 and 3847 of the Code.

The Construction Put Upon These Acts by the Commission Itself

We have seen that the Legislature of Virginia authorized a foreign express company to receive a permit to do business in this State without incorporating under its laws. The Commission itself in at least two out of the three applications made to it since the adoption of the Constitution of 1902 has adopted the same view.

[fol. 23] (a) The opinion admits that the granting of a certificate to do business in this State in 1918 to the American Railway Express Company also a Delaware corporation is a "possible" exception to the construction now given by the Commission to Section 163. We have already commented upon the granting of that certificate in 1918, and under which that company has done interstate and intrastate business down to the present time. It should be pointed out that the Railway Express Agency, Inc., is merely a successor to that company. As shown by the evi-

dence in this case (R., pp. 29-30) it has acquired all the properties of the American Railway Express Company and has assumed all of the liabilities of that Company. Furthermore, it is to use the same lines and routes that since 1918 have been used by its predecessor. Under the decisions of this Court, this makes the Railway Express Agency, Incorporated, the successor of the American Railway Express Company.

American Railway Express Co. vs. Downing, 132 Va. 139.

American Railway Express Co. vs. Royster Guano Co., 141 Va. 602.

American Railway Express Co. vs. Fleischmann, Morris & Co., 149 Va. 200.

The only difference is that the American Railway Express Company was a separate corporation not owned by the railroads themselves, as is the case with your petitioner. Surely, if the American Railway Express Company received, as it did, a certificate to do business in this State, the Railway Express Agency, Inc., is entitled to have a like certificate.

(b) The Southeastern Express Company, which is an Alabama corporation, was granted a certificate to do business in this State in 1921 and is carrying on and will continue to carry on both intrastate and interstate express business in this Commonwealth. Like the American Railway Express Company, it is owned not by the railroads over which it operates, but by other persons. In addition, the Southeastern operates over only one railroad system, whilst the Railway Express Agency, Inc., is to operate over 86 lines doing 98 per cent of the express business of the whole Country, with the right of other rail lines to participate on equal terms.

The question of the right of the Southeastern Express Company to be granted a certificate to do business in this State was carefully considered by the State Corporation [fol.24] Commission. It was finally held that that foreign express corporation was entitled to such certificate and an order was entered to that effect. If the Southeastern Express Company is authorized, as it is, to do business in this State, there are even stronger reasons, already pointed out

by us, that this joint facility or instrumentality of the railroads themselves for doing their own express business over their own lines should be granted such a certificate. If this application is refused, must not the Commission also refuse to allow the Southeastern Express Company to continue to do intrastate express business, unless it takes out a Virginia charter?

It is stated in the opinion that in the matter of the application of the Southeastern Express Company, "the same construction appears to have been given to Section 163 as the Commission had given it in the Wells-Fargo case and as is herein given to it by us." (R., pp. 256-257.) On the contrary the reasoning and the result are alike adverse. We are not particularly concerned with the reasoning by which the then Commission arrived at the right of the Southeastern Express Company to do both intrastate and interstate business in this State. We are concerned with the fact that that foreign public service corporation was licensed to transact business in this Commonwealth under the provisions of Sections 3845 and 3847 of the Code in spite of Section 163 of the Constitution. The Commission could legally grant a certificate to do business to the Southeastern Express Company only because it was of opinion that Section 163 of the Constitution did not apply to foreign express companies though incorporated since 1902, but that they came within the exceptions to said section. It is a direct decision upon the point we contend for. Under these circumstances the question is stare decisis.

(c) It would be difficult to find any case where the rule of practical construction, both by the Legislature and the Commission itself, would apply with more force and weight. Even if the right of your petitioner to the certificate prayed for was at all doubtful, still this Court would not feel justified in overruling the practical construction placed first by the Legislature and, secondly, by the Commission itself upon the right of a foreign express company to be licensed under Chapter 158 and Sections 3845 and 3847 of the Code.

Farmers Bank vs. McCavock, 119 Va. 510.

This practical construction of the right of your petitioner [fol. 25] to this certificate of authority has been held at least since 1918. The only two foreign express companies during

this time applying for such certificate have been granted the authority under those sections to do business in this State. For more than ten years both have carried on intrastate as well as interstate express transportation in this Commonwealth. This could only have been done because the officers charged both with the duty of enacting laws and those charged with the duty of carrying the laws into effect have familiarized themselves with all considerations pertinent to the meaning and purpose of Chapter 158 relating exclusively to express companies and Sections 3845 and 3847 of the Code; and that their judgment so formed constitutes an independent, conscientious and competent knowledge of the questions involved and their proper application to such questions.

Richmond vs. Drewry-Hughes Co., 122 Va. 178.

In 1918 when the right was granted the American Railway Express Company, Hon. Christopher B. Garnett was Chairman of the Commission and in 1921, when the Southeastern Express was granted the right, Judge William F. Rhea was Chairman. There has been no change in the law though a complete change in the personnel of the State Corporation Commission. This we submit is no ground for a reversal of its previous decisions.

Kelly vs. Trehy, 138 Va. 160, at page 169.

The courts have frequently commented upon this danger. It would upset every principle of construction. It would reverse the proud boast that our Government is a government of law and not of men and would make it a government of men and not of law.

The statute having been so construed by the Commission, the Petitioner had a right to rely and depend upon such construction and to proceed in accordance therewith and purchase the property of the American Railway Express Company and make contracts to carry on a state and interstate business, and in the absence of new and different facts that construction of the statute by the body charged with its administration should be accepted as the proper construction and should have been followed by the State Corporation Commission when the same question was again presented to it. A matter once fully considered and decided

must be regarded as settled unless it appears from new facts presented that the Commission was wrong.

Trougott, Schmidt & Sons vs. Michigan Central Rd. [fol. 26] Co., 23 I. C. C. 684-685;

Banner Milling Co. vs. New York Central & Hudson River Rd. Co., 14 I. C. C. 398-400.

In enacting Chapter 158 not requiring a domestic charter of a foreign express company, but only that such companies should appoint the Secretary of State as statutory agent, make the deposit of bonds required by that Chapter and carry out its other provisions, the Court will not impute to the Legislature any intention to violate the Constitution, nor will it innovate upon the settled policy of the law regarding such express companies which has survived constitutional enactment and revision of the statutes bearing upon the question; which statutes the Commission itself has held for over ten years authorized the granting of the certificate prayed for by your petitioner.

Evidence to be Considered

In arriving at a proper decision of the right of your petitioner to do business in this State and what is the real character of your petitioner as a mere agency of the participating railroads, and the further question whether the statutes relied upon, especially Chapter 158, are constitutional, the evidence submitted as bearing upon all these questions is legal and proper. No just conclusion could be arrived at without its consideration. As to the agreement between each of these railroads and your petitioner, as set out in the report and plan dated June 21, 1928, and which will be found at page 68 et seq. of this record, the Commission itself has held such agreement to be proper evidence. As an Exhibit in the case will be found a similar agreement between the Southeastern Express Company and the roads constituting the Southern Railway System, which was required by the Commission to be submitted at the hearing of the application of that express company as evidence to be considered by it in granting the application. The letter regarding the submission of that agreement to the Commission will be found in the record at page 194 and is dated the 11th day of May, 1921.

Virginia Constitution, Section 156, sub-section (f).

Jones vs. Rhea, 130 Va., at pages 354-355.

It is the Commission's duty to pass on constitutional questions, in which event it acts judicially.

Commonwealth vs. A. C. L. R. Co., 106 Va., page 61.
Norfolk & P., etc., R. Co. vs. Commonwealth, 103 Va. 289.

[fol. 27] The Refusal of This Permit Would be a Violation of the Constitution of the United States

As this petition is already so lengthy, we content ourselves with submitting to the consideration of the Court on this point the written application and plea filed with the lower tribunal and which will be found on pages 101 et seq. of the record.

We have already shown by the testimony of Mr. Norman Call, Vice-President of the R. F. & P. Railroad, that even under the Commission's construction of Section 163 of the Virginia Constitution, your petitioner should not be refused a permit to do business in this State, as, with two exceptions, the lines or routes to be used and operated over are lines and routes which extended beyond the boundary of this State at the time the Constitution of 1902 went into effect. Section 163 as to these lines and routes does not apply. Your petitioner, therefore, is entitled to a certificate of authority to do intrastate as well as interstate express transportation over these rail lines.

It has already been pointed out that two of these rail lines, the Virginian Railroad and the Clinchfield Railroad, were incorporated subsequent to 1902. It is also true, as pointed out, that the amount of intrastate business done on both of these railroads is only two per cent of the whole and the proportion of express business on these two rail lines, as compared with the total amount of general express business done in this State, is so small as to be do minimis.

But we respectfully submit that if your petitioner is to be excluded from doing an intrastate express business over these railroads because they have been incorporated since the adoption of the Constitution, such construction would make Section 163 of the Virginia Constitution unconstitutional as opposed to the Fourteenth Amendment to the Federal Constitution, which is hereby pleaded. To so hold, we submit, would be to deny to this Agency and to these railroads within the jurisdiction of this State the equal protec-

tion of the law. It would divide the railroads incorporated under the laws of Virginia into two classes. As to railroads whose lines extend, etc., when the 1902 Constitution went into effect, Section 163 would not apply. As to those incorporated since 1902, it would apply. No state constitution can make such discrimination and stand the test of constitutionality.

[fol. 28] The Requirement of the Corporation Commission That in Order to do an Intrastate Express Business in Virginia Petitioner Must Become Incorporated in Virginia is in Violation of the Constitution of the United States

Petitioner is not seeking to enter the State for the purpose of beginning the transaction of a new business, but is succeeding to the business of transporting goods by express which has been in existence in the State for upwards of fifty years. Petitioner has purchased the property and taken over the entire organization of the American Railway Express Company and is conducting the business heretofore conducted by that Company since July 1, 1918. The effect of the Corporation Commission's decision is that Petitioner can only continue transacting the interstate business heretofore conducted by American Railway Express Company and must discontinue the intrastate transportation.

The Commission points out that Petitioner may engage in intrastate business by organizing a separate corporation to carry on such business, and the Commission further says that Petitioner may do an intrastate business in Virginia by causing a corporation to be incorporated in Virginia, "and then merge the Railway Express Agency, Inc., with the Virginia Corporation under Sections 3821-3827 of the Code of Virginia." The Commission also says:

"Upon the merger, Railway Express Agency, Inc., will become a corporation incorporated both under the laws of Delaware and of Virginia and will not then be prohibited by Section 163 of the Constitution from doing an intrastate business in the State of Virginia."

The above mentioned Section 3821 provides that upon merger the consolidated company shall, upon the payment of a charter fee, "become a domestic corporation of this

State and be subject to its laws, and to the jurisdiction of its courts, * * *."

Thus it is seen that the effect of the decision of the Corporation Commission is that the Petitioner may engage in intrastate business upon condition that it become a domestic corporation subject to the jurisdiction of the State Courts. Such a requirement is clearly a violation of the Constitution of the United States.

[fol. 29] Petitioner is a Delaware corporation. It does business throughout the entire United States, in, to and through every State of the Union.

In Virginia the express business to which Petitioner has succeeded for the year ending December 31, 1928, was as follows:

Intrastate	$641,949 86
Interstate, to, from, or passing through Virginia—apportioned to this State	4,682,999 25
Total	$5,324,949 11

The gross receipts for the entire United States in that year were $285,063,377.03.

The interstate and intrastate business of petitioner is handled by the same employes, the same vehicles, on the same trains, and in the same stations, depots, terminals and offices. It would be much more expensive to organize a separate corporation and handle the intrastate business separately. It would be unthinkable that Petitioner would cease handling the intrastate business because to do so would result in untold losses and inconvenience to shippers. It is practically impossible to separate the intrastate and interstate express business. The express business has long been recognized as a valuable public service and convenience. It is, therefore, a business and economic necessity for Petitioner to carry on both an interstate and intrastate business. The Corporation Commission does not find any objection to the nature of the business which is being carried on by Petitioner and expressly recognizes that it may conduct its interstate business in Virginia without objection, but lays down the requirement that in order to conduct the necessary incidental intrastate business Petitioner

must become incorporated in the State of Virginia and become a domestic corporation of that State.

With respect to the interstate business of the Company it has a Constitutional right to have litigation arising out of such business adjudicated in the Federal Courts on the ground of diversity of citizenship. However, if it must become a domestic corporation in Virginia in order to transact its intrastate business it thereby would lose this right, and thus the practical effect of the Corporation Commission's requirement is that in order to carry on the busi- [fol. 30] ness of Petitioner as it should be carried on, and conduct its intrastate commerce along with its interstate commerce, it must give up this Constitutional right to resort to the Federal Courts.

As shown above, of the business transacted by Petitioner in Virginia only $641,949.86, or 12%, is intrastate business. If Petitioner becomes a Virginia corporation in order to do an intrastate business it must give up a valuable constitutional right to Federal Court jurisdiction with respect to the other 88% of its business.

Petitioner as a corporation of the State of Delaware is subject to the laws of Delaware as a domestic corporation in that State. If it must now become a domestic corporation in Virginia it would then be subject to the laws of both Delaware and Virginia as a domestic corporation of those States. If Virginia can impose this additional burden upon Petitioner and its interstate business, then, each of the other forty-six States in which Petitioner does business can impose like conditions, and it can readily be seen that an enormous burden upon its interstate business would result. It was just such burdens as this that the United States Constitution was intended to prevent.

"Interstate trade was not left to be destroyed or impeded by the rivalries of local Governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of Regulation against conflicting and discriminating state legislation.' (Houston & Texas Ry. v. United States, 234 U. S. 342, 350.)

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. Baltimore & Ohio Railroad Co. vs. Interstate Commerce Commission, 221 U. S. 612, 618; Southern Railway Company vs. United States, 222 U. S. 20, 26, 27; Second Employers' Liability Cases, supra, pp. 48, 51; Interstate Commerce Commission vs. Goodrich Transit Co., 224 U. S. 194, 205, 213; Minnesota Rate Cases, supra, p. 431; Illinois Central Railroad Co. vs. Behrens, 233 U. S. 473." (Houston & Texas Ry. vs. United States, 234 U. S. 342, 351.) See also [fol. 31] R. R. of Wis., et al., vs. C. B. & Q. R. Co., 257 U. S. 583.

Your Petitioner issued $32,000,000 of bonds in order to purchase the property of the American Railway Express Company under an order of the Interstate Commerce Commission, which order also authorizes it to issue $18,000,000 of bonds in addition thereto. If Petitioner is required to become a domestic corporation in Virginia, then, it becomes subject "to all the restrictions imposed upon corporations of the same class" (Code, Sec. 3827) and any stock or bonds which it may thereafter desire to issue can only be issued "after full compliance with the provisions of section one hundred and sixty-seven of the Constitution of this State, so far as applicable"; (id).

To require Petitioner to become a domestic corporation in Virginia would subject its entire business, state and interstate, throughout the entire United States, to all of the regulations, taxation, etc., within the power of the State to enforce against domestic corporations. Thus not only would the 88% interstate business done in connection with Virginia be subjected to the State laws and State courts but also the $285,000,000 of business done over Petitioner's entire system would be subject to regulation by Virginia.

In the Corporation Commission's decision it is said that to permit a foreign corporation to do an intrastate business

without becoming incorporated in the State would be "destructive of the power of the State to adequately regulate public service corporations doing intrastate business in Virginia." This cannot be so, because as to intrastate business the State has very complete powers of regulation whether such business is carried on by a domestic corporation or a foreign corporation. It is not necessary for the State to take charge of the entire business of a corporation, state and interstate, in order to regulate the intrastate business within its boundaries. Petitioner does not object to regulation of its intrastate business by the State. What it objects to is the absolute prohibition against its engaging in that business. To say that it is not prohibited from engaging in intrastate business because it can do so by organizing another corporation and merge with that corporation and thus become a domestic Virginia corporation is to beg the question and to place an unconstitutional burden upon it.

In the comparatively recent case of Terral, etc., vs. Burke Construction Company, 257 U. S. 529, the court said, at p. 532:

[fol. 32] "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, * * *. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that th- Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtain the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others, of its sovereign powers, is subject to the limitations of the supreme fundamental law."

In the above case the court considered the decisions in Doyle vs. Continental Insurance Co., 94 U. S. 535, and Se-

curity Mutual Life Ins. Co. vs. Prewitt, 302 U. S. 246, and held that they must be considered as overruled, "and that the views of the minority judges in those cases have become the law of this court." (P. 533.) The minority judges in the Doyle case were three in number. Their views, adopted in the Terral case, supra, were expressed in part as follows (94 U. S. 543, 544):

"The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or State law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the courts for redress of wrongs, or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions. * * * The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them from a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

[fol. 33] "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. * * * The needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in

large portions of the country, the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction."

"The whole thing, however free from intentional disloyalty is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brough- within their proper cognizance."

In Western Union Telegraph Company vs. Kansas, 216 U. S. 1, the court said, at page 37:

"We cannot fail to recognize the intimate connection which at this date, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business."

At page 33 the Court said:

"It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms [fol. 34] and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."

At page 34 the Court said:

"We are aware that in Paul vs. Virginia (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, Sect. 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said

by the court to show, that, if it had been, very different questions would have been presented."

The business of the Petitioner in Virginia is principally interstate commerce. It picks up packages at a shipper's residence or place of business, carries them by motor truck or wagon to the railroad station; the railroad transports the packages in charge of one of Petitioner's messengers, who rides with them. At destination Petitioner delivers the packages to the consignees. Petitioner transacts this business throughout the entire United States, thus doing an intrastate and interstate business in each of the 48 states. By far the largest proportion of its business is interstate, carried on between the various States throughout the country.

As stated by the United States Supreme Court in the Western Union case above mentioned (216 U. S. 1, at p. 37), the local business for the convenience of the people must be done and it can be done better and more economically by an interstate company than by a domestic company organized to conduct only a local business. If one of Petitioner's vehicles calls at a place of business of a merchant in Richmond, Va., and the merchant has a package to ship to Washington, D. C., Petitioner may accept it for transportation, but if the merchant has also a package which he wishes to ship to Alexandria, Va., at the same time, then, under the Corporation Commission's decision, Petitioner cannot accept it, because it is intrastate business. In the reverse direction if a shipper in Washington, D. C., wishes [fol. 35] to ship a package to a merchant in Richmond, Va., the shipper may send it by Petitioner, but a competing shipper in Alexandria, Va., cannot ship by Petitioner to the same merchant in Richmond. Many other cases of this same kind exist with respect to points adjacent to border lines of the State, and similar situations also exist on the lines over which Petitioner operates which pass out of the State and then back into the State.

The practical effect of the decision of the Corporation Commission is that in order to serve the public to the fullest extent, and do both an intrastate and an interstate business, Petitioner must comply with a statute which requires it to "become a domestic corporation of this State and be sub-

ject to its laws, and to the jurisdiction of its courts." (Code, Sec. 3821.) That is to say, that in order to transact the 12 per cent of its business which is intrastate Petitioner must give up its Constitutional right as a citizen of another State to the jurisdiction of the Federal courts over the 88 per cent of its business which is interstate and submit its entire business throughout the United States to regulation and taxation by the State of Virginia. As an alternative Petitioner may form a domestic corporation to transact the Virginia intrastate business. That would mean two complete, separate, organizations to handle the same kind of business. The Richmond merchant with a shipment for Washington, D. C., would have a wagon of the Delaware interstate corporation call for the package. If he has another package for Alexandria, Va., another wagon would call, representing the Virginia corporation. This would be absurd from a business and economic standpoint, and shippers should not be required to pay rates which would be necessary to support two such services. If the Delaware and Virginia corporations unite in handling the business by joint equipment there would then be necessary the segregation of the expense to state and interstate business. This is always difficult and expensive and impossible of accurate accomplishment. Furthermore there would be such an intermingling of state and interstate business that it would be extremely difficult if not impossible to determine with respect to some transactions whether the United States or State laws govern and whether the State or Federal courts would have jurisdiction. If a State enactment, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, then it is unconstitutional and void, although it may not have been intended to enact an invalid law. Ludwig vs. W. U. Tel. Co., 216 U. S. 146, 162.

[fol. 36] The decision of the Corporation Commission places an unlawful burden upon interstate commerce, results in discrimination between shippers and consignees, and discrimination against Petitioner, deprives Petitioner of due process of law and equal protection of the laws, all in violation of the Constitution and laws of the State of Virginia and of the United States; and Section 163 of the Virginia Constitution should not be construed in such a way as to support such decision.

For the foregoing reasons, your petitioner files this, its petition for appeal, from the final order of the State Corporation Commission, dated April 8, 1929, and assigns as error the action of the Commission in refusing to issue a certificate of authority to your petitioner to do both an intrastate and interstate express transportation business in this State, and your petitioner respectfully prays that the order of the said Commission be reviewed and reversed and that the Commission be directed by this Court to issue said certificate as required by law.

Respectfully submitted.

Railway Express Agency, Incorporated, by Counsel.
Wyndham R. Meredith, Counsel for Railway Express Agency, Inc.

Received May 11, 1929. H. S. J.

Received May 13, 1929. H. W. H.

Appeal allowed. Bond $750.00. Henry W. Holt.

Received May 14, 1929. H. S. J.

[fol. 37] BEFORE STATE CORPORATION COMMISSION OF VIRGINIA

CAPTION

Proceedings Before the State Corporation Commission in the City of Richmond, the Eighth Day of April, 1929

Be it remembered, that heretofore, on the twenty-fifth day of January, 1929, came the Railway Express Agency, Incorporated, a corporation chartered under the laws of Delaware, and filed its application for a certificate of authority under Section 3847 of the Code of Virginia to do an express business in Virginia, and thereupon certain proceedings were had as hereinafter set forth.

Certificate of R. T. Wilson, Clerk of the Commission, that necessary papers were filed by the applicant for the right to do business in accordance with Sections 3847 of the Code of Virginia.

CLERK'S CERTIFICATE

BEFORE STATE CORPORATION COMMISSION

Commonwealth of Virginia, Department of the State Corporation Commission

I hereby certify that the following necessary papers were tendered this office by Railway Agency Express, Incorporated, a Delaware corporation, for the purpose of securing a certificate of authority to do an express business in Virginia pursuant to Section 3847 of the Code of Virginia, 1919:

(a) A written power of attorney executed in duplicate, appointing the Secretary of the Commonwealth of this State and his successor in office its agent, upon whom all lawful process shall be served, and who shall be authorized to enter an appearance in its behalf. (Sec. 3847, Code of Va.)

(b) Two duly authenticated copies of the charter of the corporation. (Sec. 3847, Code of Va.)

(c) Check for $60.00 to pay the entrance fee on its maximum authorized capital of 1,000 shares without nominal or par value. (Sec. 207, Tax Code.)

(d) Check for $5.00 to pay cost in the office of the State Corporation Commission. (Sec. 3746, Code of Va.)

(e) Check for $9.85 payable to Secretary of the Com- [fol. 38] monwealth for recording in that office the power of attorney and copy of the charter of the corporation.

In testimony whereof I hereunto set my hand, at Richmond, this eighth day of April, 1929.

R. T. Wilson, Clerk State Corporation Commission.

Copy of certificate of incorporation of the Railway Express Agency, Incorporated.

BEFORE STATE CORPORATION COMMISSION

CERTIFICATE OF INCORPORATION OF RAILWAY EXPRESS AGENCY, INCORPORATED

First. The name of this corporation is Railway Express Agency, Incorporated.

Second. The principal office or place of business of this corporation in the State of Delaware is located at No. 7 West 10th Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is the Corporation Trust Company of America, No. 7 West 10th Street, Wilmington, Delaware.

Third. The nature of the business and the objects and purposes to be transacted, promoted and carried on by this corporation are:

1. To engage in, conduct and carry on in the State of Delaware, and in and between any and all of the States of the United States, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries as agent or otherwise, the express transportation business; and to handle, transport and forward by railroad, highway, water and air by means of such instrumentalities of transportation, carriage and conveyance as it may from time to time use, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and other movable personal property over and upon such lines and routes as may from time to time or at any time be established by it or with its approval, and in and between the points, communities and stations at which it may from time to time or at any time [fol. 39] establish and continue agencies; and to acquire, have, possess and exercise all the powers, privileges, rights and franchises necessary, appropriate or convenient for the aforesaid purposes, including all such as may be incident and proper for express carriers; with full power and authority to give such security in the nature of a general transportation bond or bonds as may be required by the laws of the United States and the regulations relating thereto for the transportation and delivery of dutiable merchandise and other property in bond from port to port in the United States or thorugh the United States; and to take bonds of indemnity with or without security from its agents and employees;

2. To own, construct, purchase, lease or otherwise acquire and to use, equip, repair, supply and maintain railways cars, rolling stock and machinery of all kinds; also wagons, trucks, motor vehicles, airplanes and all other means and instru- — and water; also ice houses, ice factories, refrig-

erating plants, warehouses and storage plants; also garages, stables, hangars, repair shops, storage yards, scales, platforms and other structures and appliances for the care, maintenance and repair of any of said equipment and facilities; and to sell, lease, sublet, rent or otherwise dispose of any of the aforesaid equipment, properties and instrumentalities or the use or service thereof;

3. To buy, exchange, contract for, lease and in any and all other ways acquire, hold and own, personal property of every character and description and to sell, mortgage, lease and otherwise dispose of same; and without restriction or limit as to amount to purchase or otherwise acquire, hold, own, use, improve, lease, mortgage, sell, convey or otherwise dispose of real property in any of the states, districts, territories, colonies and dependencies of the United States and in any and all foreign countries subject to the laws of such state, territory, colony, dependency or country.

4. To protect, preserve and care for, milk, cream, fruits, vegetables, meats and other perishable commodities, either while in transit or while in storage, including the icing, refrigeration, ventilation, loading, unloading, handling and storage of such commodities;

5. To engage in any kind of manufacturing business and to buy, exchange, contract for, lease, construct and other- [fol. 40] wise acquire, take, have and own, and to sell, mortgage, lease or otherwise dispose of manufacturing plants and to manage, operate, maintain, improve and develop the same;

6. To apply for, obtain, register, purchase, lease or otherwise acquire and to hold, own, use, sell, assign, lease, grant licenses in respect of, mortgage and in any manner deal with or contract in reference to any copyrights, trade marks, trade names, brands, labels, patent rights, patent processes, letters patent of the United States or of any foreign country, or any interest therein, and to use, operate and develop the same;

7. To acquire by purchase, subscription, exchange or otherwise and to hold for investment or otherwise, sell, assign, guarantee, transfer, mortgage, pledge or otherwise deal with or dispose of shares of the capital stock of, or any

bonds, securities, debentures, obligations or evidences of indebtedness created by, any corporation or corporations organized under the laws of the State of Delaware or of any other state, district or country, and also bonds or evidences of indebtedness of the United States or of any state, territory, dependency, subdivision or municipality thereof, and while the owner thereof to exercise all the rights, powers and privileges of ownership, including the right to vote on such thereof as shall have voting rights; and to provide or aid in any manner, financially or otherwise, any corporation or association whose stocks, bonds or other evidences of indebtedness or securities are held in whole or in part or in any way guaranteed by this corporation; and for this purpose to guarantee the contracts, dividends, stocks, bonds, notes and other obligations of such other corporations or associations; and to do any other acts or things designed to protect, preserve, improve or enhance the value of such stocks, bonds or other evidences of indebtedness;

8. To purchase, hold, sell and transfer shares of the capital stock, bonds or other obligations of this corporation to such an extent and in such manner and upon such terms as the Board of Directors of this corporation shall from time to time determine; provided that this corporation shall not use any of its funds or property for the purchase of its shares of capital stock, when such use would cause any impairment of the capital of this corporation; and provided, further, that shares of its capital stock belonging to this corporation shall not be voted directly or indirectly;

[fol. 41] 9. To organize or cause to be organized under the laws of the State of Delaware, or of any other state, district, territory, province or government, a corporation or corporations for the purpose of accomplishing any or all of the objects for which this corporation is organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound up, liquidated, merged or consolidated;

10. To purchase or otherwise acquire and to pay for in cash or in the stock, bonds, debentures, notes or other obligations of this corporation, all or any part of the business, good will, rights, assets and property, and to undertake or assume the whole or any part of the obligations or liabili-

ties of any person, firm, association or corporation, and to manage, operate, maintain, improve and develop any such business and property; and to sell, mortgage, lease or otherwise dispose of the same;

11. To borrow money for any of the purposes of this corporation and to issue bonds, debentures, notes or other obligations or evidences of indebtedness therefor and to secure the same by pledge or mortgage of the whole or any part of the property of this corporation, whether real or personal;

12. To loan money, and to enter into, perform and carry out contracts of every kind for any lawful purpose, with any person, firm, association or corporation, and to act as agent for any person, association, firm or corporation, and to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, warrants, bonds, debentures, traveller's checks and other negotiable or transferable instruments and bills of lading, warehouse and other receipts;

13. To have and maintain one or more offices and to conduct and carry on any or all of its operations or business in any of the states, districts, territories, colonies and dependencies of the United States and in any or all foreign countries.

14. To carry on any other lawful business whatsoever which may seem to the Board of Directors of this corporation appropriate to be carried on in connection with the above purposes or calculated directly or indirectly to promote the interest of this corporation or enhance the value [fol. 42] of its properties; and to have, enjoy and exercise all the rights, powers and privileges which are now or which may hereafter be conferred upon corporations formed under the same statutes as this corporation.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

Fourth. The total number of shares of capital stock authorized is one thousand, which shares are without nominal or par value. Such stock may be issued by the corporation

from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof.

The holder of any share or shares of stock of the corporation shall not sell, transfer or otherwise dispose of the same (other than to a successor corporation by consolidation, merger or purchase), without first offering such share or shares to the corporation for purchase at the price at which such shares were issued.

The subscription, purchase or other acquisition and the holding and ownership of shares of stock of this corporation shall, as far as may be lawful, be limited to railroad corporations.

Fifth. The number of shares of capital stock with which this corporation will commence business in ten (10) shares without nominal or par value.

Sixth. The names and places of residence of each of the subscribers to the capital stock are as follows:

Name	Residence	Number of shares
Marcus L. Bell	Noroton, Conn	4
Henry W. Clark	New York, N. Y	3
Frank C. Nicodemus, Jr.	Smithtown, N. Y	3

Seventh. This corporation is to have perpetual existence.

Eighth. The private property of the stockholders shall not be subject to the payment of the corporate debts to any extent whatever.

[fol. 43] Ninth. The number of Directors of this corporation shall be fixed by the By-laws and Directors shall be nominated as may be provided in the By-laws, and the number of Directors as fixed by the By-laws and the method of nominating said Directors as fixed by the By-laws shall not be changed except with the consent of the holders of two-thirds of the stock of the corporation. Directors need not be stockholders. In case of an increase in the number of Directors, the additional Directors may be elected by the Board of Directors to hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

To make, alter, amend and rescind the By-laws of this corporation in the manner and subject to such limitations as are herein prescribed and as may be prescribed in said By-laws; to fix, determine and vary the amounts to be maintained as working capital or reserve funds to meet contingencies or for any other proper purpose; to authorize and cause to be executed mortgages and liens upon the real or personal property, or both, of this corporation.

If the By-laws so provide or designate three or more of its members to constitute an Executive Committee, which Committee shall for the time being, as provided in the resolution of the Board creating it, or in the By-laws of this corporation, have and exercise (except when the Board of Directors shall be in session) any or all of the powers of the Board of Directors in the management of the business and affairs of this corporation and have power to authorize the seal of this corporation to be affixed to all papers which may require it.

To sell, exchange, assigns, convey, or otherwise dispose of a part of the property, assets and effects of this corporation, less than the whole or less than substantially the whole thereof, on such terms and conditions as they shall deem advisable without the consent of the stockholders in writing or otherwise.

Pursuant to the affirmative vote of the holders of at least a majority of the stock issued and outstanding, given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of at least a majority of the stock issued and outstanding, the [fol. 44] Board of Directors shall have power and authority at any time to sell, lease or exchange all of the property and assets of this corporation, including its good will and its corporate franchise, upon such terms and conditions as its Board of Directors deem expedient and for the best interest of the corporation.

This corporation may in its By-laws confer powers upon its Board of Directors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon them by the laws of the State of Delaware.

Tenth. The stockholders and Board of Directors shall have power, if the By-laws so provide, to hold their meetings and to keep the books of this corporation (except such as are required by the laws of the State of Delaware to be kept in Delaware) and documents and papers of this corporation outside of the State of Delaware and to have one or more offices within or without the State of Delaware at such places as may be designated from time to time by the Board of Directors.

Eleventh. This corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

We, the undersigned, being each of the original subscribers to the capital stock hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof and supplemental thereto, do make and file this certificate, hereby declaring and certifying that the facts herein stated are true, and do respectively agree to take the number of shares of stock hereinbefore set forth and accordingly have hereunto set our hands and seals this 6th day of December A. D. 1928.

Marcus L. Bell (L. S.), Henry W. Clark (L. S.),
Frank C. Nicodemus, Jr. (L. S.).

In presence of Barbara Stoiber.

[fol. 45] State of New York,
County of New York, ss:

Be it remembered, that on this 6th day of December, A. D. 1928, personally appeared before me, the subscriber, a notary public for the State of New York, Marcus L. Bell, Henry W. Clark and Frank C. Nicodemus, Jr., parties to the foregoing certificate of incorporation, known to me personally to be such, and severally acknowledged that they signed, sealed and delivered the same as their several

voluntary act and deed and that the facts therein stated were truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Barbara Stoiber, Notary Public, New York County. County Clerk's No. 436, Reg. No. 0-75. Term expires March 30, 1930. Barbara Stoiber, Notary Public, New York County.

State of Delaware, Office of Secretary of State

I, Charles H. Grantland, Secretary of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Railway Express Agency, Incorporated", as received and filed in this office the seventh day of December, A. D. 1928, at 1 o'clock P. M.

In Testimony Whereof, I have hereunto set my hand and official seal, at Dover, this twenty-seventh day of December, in the year of our Lord one thousand nine hundred and twenty-eight.

Charles H. Grantland, Secretary of State. (Seal.)

Copy of the power of attorney executed in duplicate and filed by the Railway Express Agency, Incorporated.

Before State Corporation Commission

Power of Attorney

For Appointment of Agent by a Foreign Corporation, doing business in Virginia, under Section 3847, Code of 1919.

[fol. 46] Know all men by these presents:

That the Railway Express Agency, Incorporated, a corporation organized and existing under the laws of Delaware, acting under and pursuant to the provisions of Section 3847 of the Code of Virginia of 1919, as amended, has established and by these presents does establish an office in the State of Virginia to be located at 201 E. Grace Street,

Richmond, at which all claims against the company due to residents of the State of Virginia may be audited, settled and paid, and has designated and does hereby designate W. K. Weaver, of Richmond, as its agent for the reception, audit, settlement and payment of claims against the company due to said residents of the State.

And the said Railway Express Agency, Incorporated, has further made, constituted and appointed and by these presents does make, constitute and appoint the Secretary of the Commonwealth of Virginia, and his successor or successors in office, to be its true and lawful agent and attorney-in-fact upon whom all legal processes against said corporation may be served, and who is hereby authorized to enter an appearance in its behalf in any case or proceedings; and the said corporation hereby stipulates and agrees that any lawful processes against the said corporation which is duly served on said agent and attorney-in-fact shall be of the same legal force and validity as if served on said corporation.

In witness whereof, the said Railway Express Agency, Incorporated, has executed this power of attorney in duplicate by causing its name to be hereunto signed by Robert A. MacLean, its President, with its corporate seal affixed and attested by Frank C. Taylor, its Secretary. All done this 19th day of January, 1929.

Railway Express Agency, Incorporated, by Robert A. MacLean, President. Affix corporate seal here. (Seal.)

Attest: Frank C. Taylor, Secretary.

[fol. 47] State of New York,
City (or County) of New York:

I, F. H. Butchorn, a Notary Public in and for the State and city or county aforesaid, hereby certify that Robert A. MacLean and Frank C. Taylor, whose names, respectively, as President and Secretary of the Railway Express Agency, Incorporated, are signed to the foregoing power of attorney, have acknowledged the same before me in my city or county aforesaid.

Given under my hand and official seal, this 19th day of January, 1929.

F. H. Butchorn, Notary Public. Certificate filed New York County No. 214. Register's Nos. Kings County No. 260, New York County No. O-209. My commission expires March 30, 1930. Affix official seal here. (Seal of Notary Public, Kings County No. 171.)

C. C. 143—10-2-28—2M.

Report and plan for future conduct of the express business by the Railway Express Agency, Incorporated, dated June 21, 1928.

BEFORE STATE CORPORATION COMMISSION

REPORT OF LEGAL COMMITTEE

W. B. Storey, Esq., Chairman Uniform Express Contract Committee.

DEAR SIR: The Legal Committee appointed on March 5, 1928, by your Committee submits the following report:

The Committee was instructed to draft an agreement to be submitted to the several railroad companies now parties to the Uniform Express Contract which will provide for the purchase of the stock of the American Railway Express Company or the formation of a new express company [fol. 48] in accordance with the terms of the resolution adopted by the Uniform Express Contract Committee and approved by the Association of Railway Executives November 16, 1927.

Pursuant to such instruction the Committee has prepared and submits herewith a "Plan for Future Conduct of Express Business". Attached to such plan are the following exhibits:

A. Agreement to be made between each participating railroad and certain agents, nominated by the Uniform Express Contract Committee, whereby such railroad assents

to the plan and appoints such agents to act for it in the consummation of the same.

B. A proposed Certificate of Incorporation of a new express company.

C. By-Laws of such Company.

D. Operating Agreement between each participating railroad and the new express company.

The object sought to be attained by the plan is to make the future express agency a railroad-owned joint facility engaging in express transportation in its own name, but nevertheless acting in fact only as the agent of its railroad principals and accounting to them under the terms of the operating agreement (Exhibit D) for all of its revenues after payment of expenses. This relationship will make the railroads transporters of express as they are of freight with a consequent like status before commissions and courts.

To accomplish such object the plan provides for the organization by the agents representing the participating railroads of a new express company to be owned by such railroads and for the acquisition by it of the properties used in express operations of the American Railway Express Company.

As an alternative it is provided that if it should prove practicable for the agents to acquire the entire outstanding capital stock of the American Railway Express Company upon satisfactory terms they shall be authorized to do so and to amend its charter and by laws and readjust its capital structure to conform to that proposed for the new express company.

It is proposed that the railroads comprising substan- [fol. 49] tially all of the membership of the Association of Railway Executives shall participate in the ownership of the express company, but with the privilege available to all other railroad companies now parties to the Uniform Express Contract to become parties to the new operating agreement.

The shares of the express company are to be allotted to each railroad in the ratio that the express business handled

on its lines, as measured in receipts, bears to the gross business so handled by all of the participating railroads. A table of participating percentages computed upon the average for the years 1923, 1924, 1925 and 1926 of the distribution of business is attached to Exhibit A.

Since the capital stock of the express company will not constitute the basis for distributing earnings (which will be disbursed under and in accordance with the provisions of the operating agreement, Exhibit D), it is proposed to limit its total to 1,000 common shares without par value to be paid for in cash at the price of $100 per share and to be nontransferable except to the express company itself, or to a successor corporation by consolidation, merger or purchase.

The proposed by-laws of the express company, subject to change in this respect only by a vote of two-thirds of the capital stock, provide that its directors shall be nominated in groups allocated to geographical districts, the railroads located in each such district to vote exclusively upon the group nominees for the same.

The properties required for express operations are to be acquired by the new express company by purchase, or by lease, or partly by purchase and partly by lease, as the agents of the railroads in their negotiations shall determine. The cost of the properties to be purchased will be financed through bonds, debentures or notes to be sold to the public, or to be taken by the respective participating railroads proportionately in accordance with the table of percentages above mentioned, or to be delivered as payment to the vendor.

The following table, showing the book values of the American Railway Express properties as of December 31, 1927, is included in this report as a matter of general information:

Land owned (cost)	$4,641,261.80
Buildings and improvements not located on railroad right of way (cost less depreciation)	6,480,984.48
[fol. 50] Buildings and improvements located on railroad right of way (cost less depreciation)	2,430,796 83

Equipment (cost less depreciation)	12,519,400 12
Materials and supplies (cost)	1,183,894.28
Total	$27,256,337.51

Dated June 21, 1928.
Respectfully submitted.
R. J. Cary, Chairman; M. L. Bell, J. P. Blair, H. W. Clark, C. B. Heiserman, F. C. Nicodemus, Jr., Legal Committee.

PLAN FOR FUTURE CONDUCT OF EXPRESS BUSINESS

It is proposed that the railroad corporations named in the table (page 25) attached to Exhibit A hereof, hereinafter called "the Railroads," unite in conducting through their own express agency, the future operations of the express business, acquiring for that purpose the operating equipment and properties, or, if practicable, the entire capital stock, of the American Railway Express Company. To accomplish that end the following plan is submitted:

1. The Railroads, severally, shall forthwith evidence their assent to this Plan by the execution of agreements in the form of Exhibit A hereto attached, said agreements embodying the appointment of Messrs. William B. Storey, Wallace W. Atterbury, Patrick E. Crowley and Carl R. Gray, as Agents of the Railroads and conferring on them the requisite power to carry this Plan into effect. The Railroads so assenting are hereinafter called the "Participating Railroads."

NOTE.—The participation in this Plan is limited to the member roads of the Association of Railway Executives, named in the table attached to Exhibit A, because of the impracticability of joining the very large number of other roads which perform in the aggregate only about 2 per cent [fol. 51] of the gross express business transacted under the Uniform Contracts with the American Railway Express Company. Any company named in the table may distribute its participation under this Plan among affiliated companies by apportionment, according to its choice, of its allotment,

hereinafter provided, of stock and of bonds, debentures or notes. The participations of any companies which have become affiliated may be combined, at their option.

2. This Plan shall be effective when agreements in the form of Exhibit A shall have been duly executed and delivered to the Agents on the part of Participating Railroads representing in the aggregate 75 per cent of the gross express business according to the allocation in the table of percentages attached to Exhibit A.

3. The Participating Railroads, severally, by their execution of the agreements, Exhibit A, will assign, transfer and set over to the Agents all their right, title and interest, respectively, under substituted Article XX of the Amended Uniform Contract for Express Operations over Rail Lines, adopted by agreements between each of the Participating Railroads and the American Railway Express Company, on or about February, 1927, embodying the agreement of the American Railway Express Company, in the event that it does not continue express operations over the lines of the contracting railroad company after midnight on February 28, 1929, to sell to such railroad company, at cost less depreciation, all property of said Express Company, used in its express operations, located on the lines of such railroad company.

NOTE.—By these assignments the Agents will be invested with the right to acquire all the equipment and operating properties of the American Railway Express Company located on the lines of the Participating Railroads, in the aggregate, and in a position, when in funds, to pay therefor a single sum price, thus avoiding any necessity of ascertaining the values separately of the express properties located on the several lines.

4. The Agents shall notify the American Railway Express Company, as soon as this Plan shall have become effective, that the Participating Railroads will not renew the existing Amended Uniform Contract for Express Operations Over Rail Lines upon its expiration on February 28, 1929, or [fol. 52] enter into negotiations for any new contract with the American Railway Express Company covering the operating of the express business after the expiration of said present contract.

5. The Agents shall secure the organization under the laws of such state as they shall choose of a new corporation, under the name of Railway Express Agency, Incorporated, or such other name as shall be found available (hereinafter called the "New Express Company"), with power to acquire all or any part of the equipment and other properties of the American Railway Express Company and to conduct the future operation of all the express business heretofore conducted by said last named company.

6. The certificate of incorporation of the New Express Company shall be substantially in the form of Exhibit B, hereto attached. It shall provide for an authorized issue of only one thousand (1000) shares of capital stock, without par value, and non-transferable except to the New Express Company itself or to a successor corporation by consolidation, merger or purchase. Said stock shall be allotted to the Participating Railroads for subscription according to the table of allotment of shares attached to Exhibit A, and the Participating Railroads by the execution of the agreements in the form of Exhibit A will subscribe, respectively, for the number of shares of said stock allotted to them according to said table, at the price of One hundred Dollars ($100) per share, payable in cash upon the call of the Agents or of the New Express Company.

NOTE.—The scheme of stock ownership above indicated is predicated upon the conclusion that the property acquired by the New Express Company should be paid for with borrowed money and represented by bonds, debentures or notes, and that the capital stock should not represent any substantial equity in the property but merely the voting rights. The indicated distribution of the shares and therefore of the voting rights conforms as closely as practicable to the percentages of gross express business done by the Railroads in the past. The distribution of the stock does not affect the distribution of earnings from the express business, which will be distributed under and in accordance with the operating contract, rather than as dividends.

7. The by-laws of the New Express Company as originally adopted shall be substantially in the form of Exhibit [fol. 53] C, hereto attached. It is an essential feature of the by-laws (which cannot be changed except by vote of

two-thirds of the outstanding capital stock) that the Board of Directors shall consist of 15 members, of whom six shall be nominated by the Participating Railroads of the Eastern District, five by those of the Western District and three by those of the Southern District, and one shall be elected at large.

8. The Agents, upon perfecting the organization of the New Express Company shall proceed to effect such qualification of the company as shall be necessary in the several states.

9. The Agents shall proceed to negotiate for and agree upon the acquisition of the equipment and operating properties of the American Railway Express Company, or as much thereof as they shall deem necessary for the operations of the New Express Company, or of properties in lieu thereof, and such acquisition may be upon any of the following bases:

(a) The purchase of all or any part of the property of the American Railway Express Company which is subject to the obligations of the aforesaid substituted Article XX of the Amended Uniform Express Contract, at its cost less the depreciation chargeable under Article V, Section 4 item (e) of said contract.

(b) The leasing of any real property owned by the American Railway Express Company which is subject to the obligations of said substituted Article XX, including buildings erected upon land not owned by said company, at such rental as the Agents shall deem satisfactory.

(c) The purchase or leasing, upon such terms as the Agents shall deem satisfactory, of any or all equipment and property owned by the American Railway Express Company and used in its express operations but not subject to the obligations of said substituted Article XX, if the agents shall conclude that there is any such property not subject thereto, and of any property so used by the American Railway Express Company but not owned by it.

(d) In the event of disagreement as to whether certain items of property are subject to the obligations of said substituted Article XX (hereinafter called "property in con-

[fol. 54] troversy"): The purchase of any property in controversy upon any consideration, other than cost less depreciation as aforesaid, deemed by the Agents substantially satisfactory from the standpoint of the Railroads; or the leasing of any property in controversy upon such terms as the Agents shall deem satisfactory; or the purchasing or leasing from other owners than the American Railway Express Company, upon such terms as the Agents shall deem satisfactory, of other property in lieu of any property in controversy; or the arrangement for the temporary use, upon such terms as the Agents shall deem satisfactory, of any or all property in controversy, or of other properties in lieu thereof, pending the settlement of such controversy; and with full power to the Agents to prosecute or defend any litigation or participate in any arbitration of the question whether particular properties are within the subject-matter of said substituted Article XX and to compromise such controversy as to any properties.

(e) The purchasing or leasing, from other owners than the American Railway Express Company, upon such terms as the Agents shall deem satisfactory, of any equipment and other property deemed by the Agents necessary for the operations of the New Express Company, whether in lieu of or in addition to equipment and other property of the American Railway Express Company.

NOTE.—It is deemed necessary that the foregoing broad authority to proceed upon alternative bases be conferred on the Agents, to empower them to proceed as the interests of the Participating Railroads appear to be best served. Any limitation of their authority might result in their inability, through the interposition of some unforeseen obstacle or contingency, to consummate this Plan. Further, the Agents would be subjected to a distinct disadvantage in negotiating for the properties of the American Railway Express Company if authority were not extended to them to acquire other properties.

10. The Agents may agree to pay in cash the consideration for any or all properties to be purchased from the American Railway Express Company; or they may agree to deliver to the American Railway Express Company bonds, debentures or notes of the New Express Company to

represent the purchase price of any or all of said properties.

[fol. 55] NOTE.—The above authority to deliver securities does not include stock of the New Express Company. It is deemed essential that the express operating agency shall realize no net income for distribution as dividends and this precludes the issue of its stock to any other holders than the Participating Railroads.

11. The total cash requirement for the purchase of all properties to be acquired for the New Express Company for cash considerations, pursuant to arrangements and agreements of the Agents, together with such an additional amount of cash as the Agents shall determine to be necessary for organization expenses and working capital, over and above the amount of the subscriptions of the Participating Railroads for the capital stock of the New Express Company as provided in the foregoing paragraph 6, shall be contributed by the Participating Railroads by their purchase of bonds, debentures or note of the New Express Company as hereinafter provided, or such cash requirement may be raised by the sale of such bonds, debentures or notes to the public. The Agents shall ascertain and determine the amount of the total cash requirement aforesaid, and determine upon and arrange for an issue of bonds, debentures or notes of the New Express Company sufficient to provide the amount of such cash requirement. Said issue of bonds, debentures or notes, if not sold to the public, shall be allotted by the Agents to the Participating Railroads on the basis of the table of percentages attached to Exhibit A, each Railroad sharing in the total issue of said bonds, debentures or notes in the proportion which the percentage assigned to it by said table bear to the aggregate of the percentages so assigned to all the Participating Railroads. Such adjustments shall be made in said allotment as may be necessary to avoid fractions of $100. Calls shall be made upon the Participating Railroads for the payment of their allotment seasonably to render the money available before February 28, 1929, and the participating Railroads shall pay their said allotments when and as called by the Agents or the New Express Company.

12. The Agents shall in their discretion determine the character of the securities to be issued by the New Express

Company, whether bonds, debentures or notes, the maturity of such bonds, debentures or notes, the mortgage security, if any, to be given therefor, the rate of interest to be borne thereby and their form and terms in all other respects, and [fol. 56] the form and terms of any mortgage securing the same and the price at which said securities shall be issued.

13. The determination as to the extent, if at all, to which the New Express Company shall take over and conduct, at least temporarily, for the future the express operations of the American Railway Express Company upon steamship or stage lines or lines of railroads not participating in this Plan shall be vested in the Agents.

14. The Agents may enter into an agreement with the American Railway Express Company, or otherwise arrange, for the taking over on February 28, 1929, of the operating and office organizations and personnel of the American Railway Express Company, its records and offices, or such part thereof as the Agents shall deem necessary or desirable for the operations of the New Express Company, and as a part of any such agreement or arrangement, the Agents may arrange for the assumption by the New Express Company of the obligation of the employees pension system of the American Railway Express Company.

15. The Agents may arrange for the assumption by the New Express Company of all or any operating liabilities of the American Railway Express Company existing on February 28, 1929, whether ascertained or not, upon the payment over to the New Express Company of the amount of the reserves set up by the American Railway Express Company for such liabilities, or upon such other consideration as the Agents shall deem satisfactory.

16. Seasonably prior to February 28, 1929, the New Express Company will pay over or deliver to the American Railway Express Company the consideration, whether in cash or securities, agreed upon for properties to be purchased from it, upon the American Railway Express Company delivering to the New Express Company, effective at the close of business on February 28, 1929, (1) a bill of sale of all personal property; (2) a contract for the sale of such

parcels of real estate as are to be conveyed by it, with the right to the immediate possession and use thereof pending the subsequent delivery of deeds, unless such deeds can be prepared seasonably for delivery at the time of closing; (3) leases of any properties agreed upon; and (4) any contract which shall have been arranged regarding the turning over [fol. 57] of the organization, records and offices or pertaining to other matters.

17. The New Express Company will file prior to February 28, 1929, with the Interstate Commerce Commission and with each State Commission, or elsewhere as shall be required, its adoption of the then existing tariffs of the American Railway Express Company as its tariffs effective March 1, 1929.

18. The New Express Company will execute and exchange with the Participating Railroads, severally, a new uniform operating contract to become effective March 1, 1929, in the form of Exhibit D hereto attached.

NOTE.—The new operating agreement is drafted with the object of making the several railroads, parties to it, common carriers of express shipments and principals in this respect, operating in the name of their common agent, the New Express Company. The Express Company will be in effect a joint facility agency, which, after deductions required for expenses and other charges, will distribute all revenues received by it among its principals. This will accomplish the change in the relationship of the railroads to the express business which has long been advocated by members of the Interstate Commerce Commission. In other respects the operating agreement follows generally the plan of the present uniform express contract. Any company named in the table attached to Exhibit A may, at its option, have any or all of its affiliated companies enter into separate operating agreements with the New Express Company.

19. The New Express Company will thereupon take over the operation of the express business on March 1, 1929.

20. If it should prove practicable for the Agents to acquire the entire outstanding capital stock of the American Railway Express Company upon terms deemed by them

satisfactory, they are authorized to do so, as an alternative to the organization of a new express company, and thereupon to disregard any provisions of this Plan incidental to the latter procedure. The Agents may purchase such stock at such price as they shall deem satisfactory and pay therefor in cash or, under a readjustment of the capital structure of the American Railway Express Company as hereinafter mentioned, by the issue of bonds, de- [fol. 58] bentures or notes of the American Railway Express Company, in lieu of the existing stock, representing such purchase price. In the event of payment in cash, the cash required shall be contributed by the Participating Railroads by the purchase of bonds, debentures or notes of the American Railway Express Company, to be issued in lieu of the existing capital stock under said readjustment of the capital structure, proportionately as provided in the foregoing Paragraph 11, or the cash required may be secured by the sale of bonds, debentures or notes to the public. The Agents shall have the same authority in respect of the securities to be issued by the American Railway Express Company under this alternative plan as that conferred on them by the foregoing paragraph 12 in the case of securities of the New Express Company. But in the event of the acquisition of the capital stock of the American Railway Express Company the Agents shall proceed forthwith to amend its certificate of incorporation and by-laws to conform substantially to Exhibits B and C, and shall allot its new no-par-value stock of the aggregate of 1000 shares to the Participating Railroads as provided in the foregoing paragraph 6, and shall thereupon surrender and have cancelled the old capital stock so acquired by them. In the event of this alternative plan being adopted, the American Railway Express Company, then under the control of the Participating Railroads, will enter into new operating contracts with the several Participating Railroads, effective March 1, 1929, in the form of Exhibit D.

NOTE.—It is essential to procedure under this alternative provision that there shall be no minority of old stockholders of American Railway Express Company outstanding after the Participating Railroads acquire control.

21. Any railroad which does not become a party to this Plan, including the numerous short roads to which full par-

ticipation is not extended, will still be under the obligation of substituted Article XX of the Amended Uniform Contract to buy the express properties located on its lines. Presumably although not parties to this plan, such roads will deem it desirable to assign their rights under substituted Article XX to the Agents. The Agents are authorized to accept such assignments upon receiving the undertakings of such non-participating railroads to pay over to the Agents the amount necessary to pay the cost less depreciation of the properties local to their lines, or under such other arrangement as they shall deem satisfactory. [fol. 59] If, pursuant to their arrangement with the Agents, such non-participating railroads shall contribute to the payment for the properties local to their lines, they shall be reimbursed by the Agents, by the vesting in them of the ownership of such properties or by bonds, notes or debentures of the New Express Company. The Agents may require, as a condition of accepting such assignments that such non-participating railroads agree upon the form of operating contract, Exhibit D, with the New Express Company to cover future operations or some other form which will be satisfactory to the Participating Railroads.

22. It is understood that the consummation of the Plan shall be subject, in such respect as shall be required by law, to the approval of appropriate public authority.

Dated June 21, 1928.

W. B. Storey, Chairman; W. W. Atterbury, P. E. Crowley, Charles Donnelly, L. A. Downs, Carl R. Gray, E. J. Pearson, Bird M. Robinson, Uniform Express Contract and Pullman Surcharge Committee.

EXHIBIT A TO PLAN

Agreement with Agents

Agreement Between —— Company and William B. Storey, Wallace W. Atterbury, Patrick E. Crowley, Carl R. Gray, Agents

Dated July 2, 1928

[fol. 60] Agreement with Agents

Agreement, dated as of the 2nd day of July, 1928, by and between —— —— (hereinafter called the Railroad), on the

one part, and William B. Storey, Wallace W. Atterbury, Patrick E. Crowley, and Carl R. Gray (hereinafter called the Agents) on the other part:

For and in Consideration of the execution and delivery to the Agents of agreement identical herewith on the part of other railroad companies of the United States (said other railroad companies and the Railroad being hereinafter collectively called the Participating Railroads) to the number requisite to make this agreement effective as hereinafter provided, the Railroad agrees with the Agents and with all such other Participating Railroads as follows:

1. This agreement shall become effective when agreements identical in form herewith shall have been duly executed and delivered to the Agents on the part of railroad corporations, named in the table attached to the agreement, representing in the aggregate 75 per cent of the gross express business as allocated in said table.

2. The Railroad hereby assents to the Plan, dated June 21, 1928, prefixed hereto, issued by the Uniform Express Contract Committee of the Association of Railway Executives, for the acquisition by the Participating Railroads of the operating equipment and properties, or, if practicable, the entire capital stock of the American Railway Express Company, and the conduct of the future operations of the express business by the Participating Railroads through their own express agency.

3. The Railroad hereby irrevocably appoints the parties of the second part as its agents and attorneys to represent and act for it in all matters pertaining to the carrying out and the accomplishment of the Plan aforesaid, as fully as the Railroad could do if acting through its own officers; hereby ratifying and confirming all that said agents and attorneys shall do by virtue hereof.

[fol. 61] 4. The Agents are hereby authorized to take any and all action and proceedings, as principals or as agents, in their own person and names or through substitutes and agents appointed and authorized by them, necessary or appropriate to carry into effect the Plan aforesaid by any of the methods provided herein, in substantial accord with the provisions of said Plan, and the Agents shall in the

exercise of the powers and authority expressed in said Plan have and be entitled to exercise such further power and authority as shall be necessary or appropriate to the exercise of any expressed power or authority.

5. The Railroad hereby assigns, transfers and sets over to the Agents all its right, title and interest under substituted Article XX of the Amended Uniform Express Contract for Express Operations Over Rail Lines adopted by agreement between the Railroad and the American Railway Express Company, dated —— —, 1927, as follows:

"All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and shall take effect on March 1, 1923, and the agreement effective September 1, 1920, as hereby amended, shall continue in force until midnight on February 28, 1929.

In the event the Express Company does not continue express operations over the lines of the Rail Company after midnight on February 28, 1929, then at that time the Rail Company shall purchase from the Express Company and the Express Company shall sell to the Rail Company, at cost less the depreciation chargeable under Article V, Section 4, item (e) of this contract, all property of the Express Company used on its express operations hereunder located on the lines of the Rail Company. The Rail Company hereby confirms the depreciation rates now and heretofore used by the Express Company and said rates shall be continued to the termination of this contract subject to the provisions of said Article V, Section 4, item (e)."

and in and to all property of the said American Railway Express Company used in its express operations located on the lines of the Railroad.

6. In organizing or securing the organization of the New [fol. 62] Express Company pursuant to said Plan the Agents are hereby instructed to conform the certificate of incorporation and by-laws of such company substantially to the forms of Exhibits B and C hereto attached, and in no event to change the provision for a board of fifteen directors or the provision for the nomination of six directors by the Participating Railroads of the Eastern Dis-

trict, five directors by the Western District, three directors by the Southern District, and the election of one director at large. In the event of the acquisition by the Agents, pursuant to the Plan, of the entire capital stock of the American Railway Express Company, then the Agents are hereby instructed to cause such amendments to be made to the certificate of incorporation and by-laws of said Company as will make the same conform substantially to the forms of Exhibits B and C hereto attached.

7. Upon the organization of the New Express Company the Agents are hereby authorized to assign, transfer and set over to the New Express Company the right, title and interest hereinbefore assigned, transferred and set over to the Agents by the Railroad, under substituted Article XX of the Amended Uniform Contract for Express Operations Over Rail Lines and in and to the properties of the American Railway Express Company located on the lines of the Railroad; and the New Express Company or the Agents are hereby authorized to exercise and enforce the right now vested in the Railroad to purchase all properties of the American Railway Express Company located on the lines of the Railroad.

8. On call and demand by the Agents or by the New Express Company the Railroad will pay, on or before the date designated for such payment in said call or demand, to the Agents or the New Express Company the amount of its allotment, determined as hereinafter provided, at the price fixed by the agents, and any accrued interest thereon, of a total issue of bonds, debentures or notes of the New Express Company authorized and issued or to be issued by the New Express Company, as provided in said Plan, representing the total cash requirement for the properties to be purchased by or for the New Express Company for a cash consideration, together with an additional amount determined by the Agents for organization expenses and working capital. The Railroad's allotment of said total issue shall be such proportion thereof as the percentage assigned to it by the table of percentages hereto attached bears to the aggregate of the percentages [fol. 63] assigned by said table to all the Participating

Railroads, subject to any arbitrary adjustment necessary to avoid a fraction of $100. Upon such payment the Railroad will accept the temporary receipt of the New Express Company evidencing the amount of bonds, debentures or notes to which the Railroad is entitled, exchangeable for definite bonds, debentures or notes when ready for delivery. In the event of the acquisition by the Agents, pursuant to the Plan, of the entire capital stock of the American Railway Express Company and the payment for such stock in cash, then the provisions of this paragraph shall be applicable to the cash required for such purchase and the Railroad will pay for its allotment as provided in this paragraph of the total issue of bonds, debentures or notes to be issued by the American Railway Express Company in that event as provided in the Plan.

9. The Railroad hereby subscribes for and agrees to take shares of the no-par-value capital stock of the New Express Company, fully paid and non-assessable (of a total original issue not exceeding one thousand shares), to the number stated opposite its name in the table of allotment of stock hereto attached; and the Railroad hereby agrees to pay for said shares at the price of One hundred Dollars ($100) per share upon call or demand therefor by the Agents or the New Express Company. Upon such payment the Railroad will accept the interim certificate or temporary receipt of the New Express Company evidencing the number of shares to which the Railroad is entitled, exchangeable for definite stock certificates when ready for delivery. In the event of the acquisition by the Agents, pursuant to the Plan, of the entire capital stock of the American Railway Express Company, then the Railroad hereby subscribes for and agrees to take shares of the no-par-value stock of the American Railway Express Company to be issued as provided in the Plan to the amount and upon the terms hereinabove expressed.

10. The action of a majority of the Agents shall be sufficient as the act of all the Agents. In the event of the disability or death of one of the Agents, the surviving Agents shall appoint a successor or substitute by an instrument of appointment and substitution signed and acknowledged by them and lodged with the Chairman or Secretary of the Association of Railway Executives. Thereupon such suc-

cessor or substitute shall be vested with all the powers and authority conferred by this agreement upon his said predecessor.

[fol. 64] 11. The Railroad hereby agrees to execute with the New Express Company or with the American Railway Express Company, in the event of the acquisition by the Agents, pursuant to the Plan, of the entire capital stock of said Company, an operating agreement for the conduct of the express business on its lines of railroad, effective March 1, 1929, in the form or substantially the form of Exhibit D hereto attached.

In Witness Whereof, the Railroad has caused this agreement to be executed by its officers thereunto duly authorized and its corporate seal to be hereto affixed and the Agents have hereunto set their hands and seals as of the day and year first above written.

Company by . Attest: .
Secretary. (L. S.), (L. S.),
(L. S.), (L. S.), Agents.

Table of (1) Percentages, (2) Allotment of Shares

	Percentages	Shares of stock
1. The New York Central Railroad Company	14.426	144
2. The Pennsylvania Railroad Company	12.608	126
3. The Atchison, Topeka & Santa Fe Railway Company	4.608	46
[fol. 65] 4. Southern Pacific Company	4.469	45
5. The New York, New Haven & Hartford Railroad Company	4.402	44
6. The Baltimore and Ohio Railroad Company	3.869	39
7. Chicago and North Western Railway Company	3.288	33
8. Illinois Central Railroad Company	2.864	29
9. Chicago, Burlington & Quincy Railroad Company	2.670	27
10. Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2.647	26

	Percentages	Shares of stock
11. Erie Railroad Company	2.549	25
12. Union Pacific Railroad Company	2.532	25
13. Boston and Maine Railroad	2.290	23
14. The Chicago, Rock Island and Pacific Railway Company	2.230	22
15. Louisville & Nashville Railroad Company	2.021	20
16. Missouri Pacific Railroad Company	1.989	20
17. Atlantic Coast Line Railroad Company	1.956	20
18. Seaboard Air Line Railway Company	1.586	16
19. Great Northern Railway Company	1.468	15
20. St. Louis-San Francisco Railway Company	1.404	14
21. The Delaware, Lackawanna and Western Railroad Company	1.369	14
22. Reading Company	1.246	12
23. Wabash Railway Company	1.229	12
24. Missouri-Kansas-Texas Railroad Company	1.173	12
25. Northern Pacific Railway Company	1.172	12
26. The Central Railroad Company of New Jersey	1.070	11
27. The Chesapeake and Ohio Railway Company	1.016	10
28. Lehigh Valley Railroad Company	.995	10
29. Norfolk and Western Railway Company	.853	9
30. Pere Marquette Railway Company	.709	7
31. Richmond, Fredericksburg and Potomac Railroad Company	.668	7
32. The Texas and Pacific Railway Company	.655	7
33. Canadian National Railway Company	.647	6
34. Central of Georgia Railway Company	.621	6
35. Minneapolis, St. Paul and Sault Ste. Marie Railway Company	.605	6
[fol. 66] 36. Florida East Coast Railway Company	.598	6
37. The Chicago & Alton Railroad Company	.573	6
38. The Denver and Rio Grande Western Railroad Company	.545	5

	Percentages	Shares of stock
39. Chicago and Eastern Illinois Railway Company	.545	5
40. The Delaware & Hudson Company	.488	5
41. Maine Central Railroad Company	.474	5
42. The New York, Chicago and St. Louis Railroad Company	.417	4
43. The Nashville, Chattanooga & St. Louis Railway	.414	4
44. St. Louis Southwestern Railway Company	.371	4
45. Chicago Great Western Railroad Company	.368	4
46. The Colorado and Southern Railway Company	.317	3
47. Chicago, Indianapolis & Louisville Railway Company	.311	3
48. The Kansas City Southern Railway Company	.289	3
49. The Western Pacific Railroad Company	.236	2
50. Atlanta and West Point Railroad Company	.233	2
51. New York, Ontario & Western Railway Company	.206	2
52. The Minneapolis and St. Louis Railroad Company	.173	2
53. Northwestern Pacific Railroad Company	.142	1
54. Central Vermont Railway Company	.139	1
55. Buffalo, Rochester and Pittsburgh Railway Company	.130	1
56. Norfolk Southern Railroad Company	.123	1
57. Atlanta, Birmingham and Coast Railroad Company	.084	1
58. Western Maryland Railway Company	.080	1
59. Bangor and Aroostook Railroad Company	.076	1
60. The Wheeling and Lake Erie Railway Company	.068	1
61. The Virginian Railway Company	.065	1
62. The Duluth, South Shore and Atlantic Railway Company	.063	1
63. The Ann Arbor Railroad Company	.044	1

	Percentages	Shares of stock
64. The Ulster and Delaware Railroad Company	.043	1
65. Midland Valley Railroad Company	.039	1
66. Gulf, Mobile and Northern Railroad Company	.037	1
[fol. 67] 67. Clinchfield Railroad Company	.037	1
68. Bessemer and Lake Erie Railroad Company	.030	1
69. Chicago and Western Indiana Railroad Company	.027	1
70. New Orleans Great Northern Railroad Company	.025	1
71. Louisiana & Arkansas Railroad Company	.024	1
72. Winston-Salem Southbound Railroad Company	.021	1
73. Fort Smith and Western Railway Company	.021	1
74. The Denver & Salt Lake Railway Company	.021	1
75. The Trinity and Brazos Valley Railway Company	.015	1
76. Detroit, Toledo and Ironton Railroad Company	.016	1
77. Georgia, Florida & Alabama Railway Co.	.014	1
78. Nevada Northern Railway Company	.011	1
79. Buffalo and Susquehanna Railroad Corporation	.009	1
80. The Huntington and Broad Top Mountain Railroad and Coal Company	.007	1
81. Lake Superior & Ishpeming Railroad Company	.005	1
82. The Akron, Canton & Youngstown Railway Company	.005	1
83. Canadian Pacific Railway Company	.005	1
84. Cumberland and Pennsylvania Railroad	.005	1
85. Abilene and Southern Railway	.004	1
86. Lehigh and New England Railroad Company	.002	1
	100.000	999

[fol. 68] EXHIBIT B TO PLAN

Certificate of Incorporation of Railway Express Agency, Incorporated

Certificate of Incorporation of Railway Express Agency, Incorporated

First. The name of this corporation is Railway Express Agency, Incorporated.

Second. The principal office or place of business of this corporation in the State of Delaware is located at No. 7 West 10th Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is the Corporation Trust Company of America, No. 7 West 10th Street, Wilmington, Delaware.

Third. The nature of the business and the objects and purposes to be transacted, promoted and carried on by this corporation are:

1. To engage in, conduct and carry on in the State of Delaware, and in and between any and all of the States of the United States, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries as agent or otherwise, the express transportation business; and to handle, transport and forward by railroad, highway, water and air by means of such instrumentalities of transportation, carriage and conveyance as it may from time to time use, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and other movable personal property over and upon such lines and routes as may from time to time or at any time be established by it or with its approval, and in and between the points, communities and stations at which it may from time to time or at any time establish and continue agencies; and [fol. 69] to acquire, have, possess and exercise all the powers, privileges, rights and franchises necessary, appropriate or convenient for the aforesaid purposes, including all such as may be incident and proper for express carriers; with full power and authority to give such security in the nature of a general transportation bond or bonds as may be required by the laws of the United States and the regulations relating thereto for the transportation and delivery

of dutiable merchandise and other property in bond from port to port in the United States or through the United States; and to take bonds of indemnity with or without securtiy from its agents and employees;

2. To own, construct, purchase, lease or otherwise acquire and to use, equip, repair, supply and maintain railways cars, rolling stock and machinery of all kinds; also wagons, trucks, motor vehicles, airplanes and all other means and instrumentalities of transportation and conveyance by land, air and water; also ice houses, ice factories, refrigerating plants, warehouses and storage plants; also garages, stables, hangars, repair shops, storage yards, scales, platforms and other structures and appliances for the care, maintenance and repair of any of said equipment and facilities; and to sell, lease, sublet, rent or otherwise dispose of any of the aforesaid equipment, properties and instrumentalities or the use or service thereof;

3. To buy, exchange, contract for, lease and in any and all other ways acquire, hold and own, personal property of every character and description and to sell, mortgage, lease and otherwise dispose of same; and without restriction or limit as to amount to purchase or otherwise acquire, hold, own, use, improve, lease, mortgage, sell, convey or otherwise dispose of real property in any of the states, districts, territories, colonies and dependencies of the United States and in any and all foreign countries subject to the laws of such state, territory, colony, dependency or country.

4. To protect, preserve and care for, milk, cream, fruits, vegetables, meats and other perishable commodities, either while in transit or while in storage, including the icing, refrigeration, ventilation, loading, unloading, handling and storage of such commodities;

5. To engage in any kind of manufacturing business and to buy, exchange, contract for, lease, construct and other- [fol. 70] wise acquire, take, have and own, and to sell, mortgage, lease or otherwise dispose of manufacturing plants and to manage, operate, maintain, improve and develop the same;

6. To apply for, obtain, register, purchase, lease or otherwise acquire and to hold, own, use, sell, assign, lease, grant

licenses in respect of, mortgage and in any manner deal with or contract in reference to any copyrights, trade marks, trade names, brands, labels, patent rights, patent processes, letters patent of the United States or of any foreign country, or any interest therein, and to use, operate and develop the same;

7. To acquire by purchase, subscription, exchange or otherwise and to hold for investment or otherwise, sell, assign, guarantee, transfer, mortgage, pledge or otherwise deal with or dispose of shares of the capital stock of, or any bonds, securities, debentures, obligations or evidences of indebtedness created by, any corporation or corporations organized under the laws of the State of Delaware or of any other state, district or country, and also bonds or evidences of indebtedness of the United States or of any state, territory, dependency, subdivision or municipality thereof, and while the owner thereof to exercise all the rights, powers and privileges of ownership, including the right to vote on such thereof as shall have voting rights; and to provide or aid in any manner, financially or otherwise, any corporation or association whose stocks, bonds or other evidences of indebtedness or securities are held in whole or in part or in any way guaranteed by this corporation; and for this purpose to guarantee the contracts, dividends, stocks, bonds, notes and other obligations of such other corporations or associations; and to do any other acts or things designed to protect, preserve, improve or enhance the value of such stocks, bonds or other evidences of indebtedness;

8. To purchase, hold, sell and transfer shares of the capital stock, bonds or other obligations of this corporation to such an extent in such manner and upon such terms as the Board of Directors of this corporation shall from time to time determine; provided that this corporation shall not use any of its funds or property for the purchase of its shares of capital stock, when such use would cause any impairment of the capital of this corporation; and provided, [fol. 71] further, that shares of its capital stock belonging to this corporation shall not be voted directly or indirectly;

9. To organize or cause to be organized under the laws of the State of Delaware, or of any other state, district,

territory, province or government, a corporation or corporations for the purpose of accomplishing any or all of the objects for which this corporation is organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound up, liquidated, merged or consolidated;

10. To purchase or otherwise acquire and to pay for in cash or in the stock, bonds, debentures, note or other obligations of this corporation, all or any part of the business, good will, rights, assets and property, and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, association or corporation, and to manage, operate, maintain, improve and develop any such business and property; and to sell, mortgage, lease or otherwise dispose of the same;

11. To borrow money for any of the purposes of this corporation and to issue bonds, debentures, notes or other obligations or evidences of indebtedness therefor and to secure the same by pledge or mortgage of the whole or any part of the property of this corporation, whether real or personal;

12. To loan money, and to enter into, perform and carry out contracts of every kind for any lawful purpose, with any person, firm, association or corporation, and to act as agent for any person, association, firm or corporation, and to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, warrants, bonds, debentures, traveller's checks and other negotiable or transferable instruments and bills of lading, warehouse and other receipts;

13. To have and maintain one or more offices and to conduct and carry on any or all of its operations or business in any of the states, districts, territories, colonies and dependencies of the United States and in any or all foreign countries.

14. To carry on any other lawful business whatsoever which may seem to the Board of Directors of this corpora- [fol. 72] tion appropriate to be carried on in connection with the above purposes or calculated directly or indirectly to

promote the interest of this corporation or enhance the value of its properties; and to have, enjoy and exercise all the rights, powers and privileges which are now or which may hereafter be conferred upon corporations formed under the same statutes as this corporation.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

Fourth. The total number of shares of capital stock authorized is one thousand, which are without nominal or par value. Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof.

The holder of any share or shares of stock of the corporation shall not sell, transfer or otherwise dispose of the same (other than to a successor corporation by consolidation, merger or purchase), without first offering such share or shares to the corporation for purchase at the price at which such shares were issued.

The subscription, purchase or other acquisition and the holding and ownership of shares of stock of this corporation shall, as far as may be lawful, be limited to railroad corporations.

Fifth. The number of shares of capital stock with which this corporation will commence business is ten (10) shares without nominal or par value.

Sixth. The names and places of residence of each of the subscribers to the capital stock are as follows:

Name	Residence	Number of shares
.....	.....	.....
.....	.....	.....
.....	.....	.....

Seventh. This corporation is to have perpetual existence.

[fol. 73] Eighth. The private property of the stockholders shall not be subject to the payment of the corporate debts to any extent whatever.

Ninth. The number of Directors of this corporation shall be fixed by the By-laws and Directors shall be nominated as may be provided in the By-Laws, and the number of Directors as fixed by the By-laws and the method of nominating said Directors as fixed by the By-laws shall not be changed except with the consent of the holders of two-thirds of the stock of the corporation. Directors need not be stockholders. In case of an increase in the number of Directors, the additional Directors may be elected by the Board of Directors to hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

To make, alter, amend and rescind the By-laws of this corporation in the manner and subject to such limitations as are herein prescribed and as may be prescribed in said By-laws; to fix, determine and vary the amounts to be maintained as working capital or reserve funds to meet contingencies or for any other proper purpose; to authorize and cause to be executed mortgages and liens upon the real or personal property, or both, of this corporation.

If the By-laws so provide, to designate three or more of its members to constitute an Executive Committee, which Committee shall for the time being, as provided in the resolution of the Board creating it, or in the By-laws of this corporation, have and exercise, (except when the Board of Directors shall be in session), any or all of the powers of the Board of Directors in the management of the business and affairs of this corporation and have power to authorize the seal of this corporation to be affixed to all papers which may require it.

To sell, exchange, assign, convey or otherwise dispose of a part of the property, assets and effects of this corporation, less than the whole or less than substantially the whole thereof, on such terms and conditions as they shall deem [fol. 74] advisable without the consent of the stockholders in writing or otherwise.

Pursuant to the affirmative vote of the holders of at least a majority of the stock issued and outstanding, given at a stockholders' meeting duly called for that purpose, or when

authorized by the written consent of at least a majority of the holders of the stock issued and outstanding, the Board of Directors shall have power and authority at any time to sell, lease or exchange all of the property and assets of this corporation, including its good will and its corporate franchise, upon such terms and conditions as its Board of Directors deem expedient and for the best interest of the corporation.

This corporation may in its By-laws confer powers upon its Board of Directors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon them by the laws of the State of Delaware.

Tenth. The stockholders and Board of Directors shall have power, if the By-laws so provide, to hold their meetings and to keep the books of this corporation (except such as are required by the laws of the State of Delaware to be kept in Delaware) and documents and papers of this corporation outside the State of Delaware and to have one or more offices within or without the State of Delaware at such places as may be designated from time to time by the Board of Directors.

Eleventh. This corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

We, the undersigned, being each of the original subscribers to the capital stock hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof and supplemental thereto, do make and file this certificate, hereby declaring and certifying that the facts herein stated are true, and do respectively agree to take the number of shares of stock hereinbefore set forth [fol. 75] and accordingly have hereunto set our hands and seals this — day of ——, A. D. 1928.

In presence of —— ——.

—— —— (L. S.), —— —— (L. S.), —— —— (L. S.).

Exhibit C to Plan

Railway Express Agency, Incorporated, By-Laws

Railway Express Agency, Incorporated, By-Laws

Article I

Offices

Section 1. The principal office of the corporation is in the City of Wilmington, County of New Castle, State of Delaware, and the name of the resident agent in charge thereof is the Corporation Trust Company of America.

Section 2. The corporation may also have an office in the City of New York, State of New York, and also offices at such other places as the Board of Directors may from time to time appoint or the business of the corporation may from time to time require.

Article II

Stock

Section 1. The certificates of stock of the corporation shall be numbered and shall be entered in the books of the [fol. 76] corporation as they are issued. They shall set forth the holder's name and the number of shares and shall be signed by the President or a Vice-President and the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary.

Section 2. Subject to any limitations prescribed by law railroad corporations only shall be entitled to subscribe for, purchase or otherwise acquire and to hold shares of stock of the corporation and the certificates of stock shall so provide.

Section 3. In case the holder of any of the shares of stock of the corporation shall desire to sell, transfer or otherwise dispose of the same or any part thereof (other than to a successor corporation by consolidation, merger or purchase), such holder shall offer said shares for sale to the corporation at the price at which said shares were issued by

the corporation and upon payment of such price by the corporation shall transfer said shares to the corporation, and the certificates of stock shall so provide. Upon the transfer of any of said shares of stock to the corporation each member of the District as described in Section 7 of Article III hereof of which such seller was a member, shall, in case the Board of Directors in its discretion shall so request, contribute towards the amount paid by the corporation for said shares in the proportion that the number of shares of stock of the corporation held by such member bears to the aggregate number of shares of stock of the corporation held by all members of the District and upon such contribution shall be entitled to receive from the corporation its proportionate part of such number of shares of stock so acquired as may be distributed without causing fractional shares.

Section 4. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney lawfully constituted in writing and upon surrender of the certificate therefor.

Section 5. The Board of Directors may close the stock transfer books in their discretion for a period not exceeding forty days preceding the date of any meeting of stockholders or the date for the allotment of any rights.

Section 6. The corporation shall be entitled to treat the [fol. 77] holder of record of any share or shares of stock as the holder in fact thereof and shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person, whether or not it shall have express or other notice thereof, save as expressly provided by the laws of Delaware.

Article III

Stockholders' Meetings

Section 1. All meetings of the stockholders shall be held at the office of the corporation in the City of New York, State of New York.

Section 2. An annual meeting of stockholders after the year 1928, shall be held on the twentieth day of January in

each year, if not a legal holiday and if a legal holiday then on the next secular day following, at 11 o'clock A. M., at which meeting there shall be elected by ballot a Board of fifteen Directors and at which meeting there shall be transacted such other business as may properly be brought before the meeting. Fourteen members of the Board of Directors shall be elected from the persons nominated by Districts as provided in Section 7 of this Article.

Section 3. The holders of a majority of the stock issued and outstanding, present in person, or represented by proxy, shall be requisite and shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by law, by the certificate of incorporation or by these by-laws. If, however, such majority shall not be present or represented at any meeting of the stockholders, the stockholders present in person, or by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until the requisite amount of stock shall be present. At such adjourned meeting at which the requisite amount of stock shall be represented any business may be transacted which might have been transacted at the meeting as originally notified.

Section 4. At each meeting of the stockholders every stockholder shall be entitled to vote in person, or by proxy appointed by an instrument in writing subscribed by such stockholders and bearing a date not more than thirty days prior to said meeting, unless said instrument provides for [fol. 78] a longer period. Each stockholder shall have one vote for each share of stock registered in his name on the books of the corporation, except that no share of stock shall be voted at any election for directors which has been transferred on the books of the corporation within twenty days next preceding such election. The vote for directors, and, upon demand of any stockholder, the vote upon any question before the meeting, shall be by ballot. All elections shall be had and all questions decided by a plurality vote.

Section 5. Written notice of the annual meeting of stockholders shall be mailed to each stockholder at such address as appears on the stock book of the corporation, at least ten days prior to the meeting. A complete list of the stockhold-

ers, arranged in alphabetical order, with the residence of each, and the number of shares held by each, shall be prepared by the Secretary and filed in the office where the election is to be held, at least ten days before every election, and shall at all times, during the usual hours for business, and during the whole time of said election, be open to the examination of any stockholder.

Section 6. Special meetings of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the President, and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors, or at the request in writing of stockholders owning a majority in amount of the entire capital stock of the corporation issued and outstanding. Such request shall state the purpose or purposes of the proposed meeting. Business transacted at all special meetings shall be confined to the objects stated in the call. Written notice of a special meeting of stockholders, stating the time and place and object thereof shall be mailed, postage prepaid, at least ten days before such meeting, to each stockholder at such address as appears on the books of the corporation.

Section 7. Of the total number of directors to be elected at the annual meeting of stockholders, fourteen thereof shall be nominated by Districts as provided in this Section. For the purposes of such nomination the Continental United States shall be divided into three Districts known as the Eastern District, the Southern District and the Western District.

The Eastern District shall be bounded by the Atlantic Sea-[fol. 79] board from the Canadian Boundary to Norfolk, Virginia, by the main line of the Norfolk and Western Railway from Norfolk, Virginia, to Kenova, West Virginia, by the main line of the Chesapeake & Ohio Railway from Kenova, West Virginia, to Cincinnati, Ohio, by the Ohio River from Cincinnati, Ohio, to Cairo, Illinois, by the Mississippi River from Cairo, Illinios, to the mouth of the Illinois River at or near Grafton, Illinois, by the Illinois River from Grafton, Illinois, to Pekin, Illinois, by a line south and east of the Atchison, Topeka and Santa Fe Railway from Pekin, Illinois, through Joliet and Streator, Illinois,

to Chicago, Illinois, by a line drawn from Chicago, Illinois, to include the Southern Peninsula of Michigan and thence following the Canadian Boundary to the Atlantic Seaboard. The Norfolk and Western Railway and the Chesapeake & Ohio Railway shall be included in the Eastern District.

The Southern District shall be bounded by the Atlantic Seaboard on the East, by the southerly line of the Eastern District on the North, by the Mississippi River on the West, and by the Gulf of Mexico on the South.

The Western District shall be bounded by the westerly lines of the Eastern District and the Southern District on the East, by the Gulf of Mexico and the Mexican Boundary on the South, by the Pacific Ocean on the West, and by the Canadian Boundary on the North.

Each railroad corporation which is the holder of a share or shares of stock or the corporation shall be deemed a member of the District in which its line of railroad is located, or if located in one or more Districts, of the District in which the greater portion of its single track mileage is located.

Six directors shall be nominated by the members of the Eastern District, five directors by the members of the Western District and three directors by the members of the Southern District.

Not more than twenty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the corporation shall send to each holder of stock of the corporation located in any of the three Districts, a form of vote for nomination for directors from the District of which such stockholder is a member, stating the number of directors to be nominated by the members of such District and that the vote of such stockholder should be mailed to the Secretary at least seven days prior to the date of the annual meeting of stockholders. The stockholder receiving such notice shall thereupon name the persons proposed [fol. 80] by such stockholder as nominees for directors from the District of which such stockholder is a member and return such vote to the Secretary with a statement of the name of such stockholder and the number of shares of stock of the corporation held by such stockholder.

Prior to the date of the annual meeting of stockholders the Secretary shall canvass the votes of the members of

each District for nominations for directors from such District and shall report the nominations of Districts for fourteen directors to the stockholders at the annual meeting thereof.

Article IV

Directors

Section 1. The property and business of the corporation shall be managed by its Board of Directors, fifteen in number. Directors need not be stockholders. They shall be elected at the annual meeting of the stockholders, and each director shall be elected to serve until his successor shall be elected and shall qualify.

Section 2. The directors may hold their meetings and have one or more offices and keep the books of the corporation, except the original or duplicate stock ledger, outside of the State of Delaware, at the office of the corporation in the City of New York, State of New York, or at such other places as they may from time to time determine.

Section 3. In addition to the powers and authorities by these by-laws expressly conferred upon them, the Board may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders.

Section 4. Directors, as such, shall not receive any stated salary for their services, but by resolution of the Board, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of the Board; provided, that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

Section 5. Regular meetings of the Board may be held [fol. 81] without notice at such time and place as shall from time to time be determined by the Board.

Section 6. Special meetings of the Board may be called by the President on three days' notice to each director,

either personally or by mail or by telegram; special meetings shall be called by the President or Secretary in like manner and on like notice on the written request of three directors.

Section 7. At all meetings of the Board a majority of the directors shall be necessary and sufficient to constitute a quorum for the transaction of business, and the act of a majority of the directors present at any meeting at which there is a quorum, shall be the act of the Board of Directors, except as may be otherwise specifically provided by statute or by the certificate of incorporation or by these by-laws.

Article V

Executive Committee

Section 1. There may be an Executive Committee of five directors designated by resolution passed by a majority of the whole Board. Said Committee may meet at stated times, or on notice to all by any of their own number. During the intervals between meetings of the Board such Committee shall advise with and aid the officers of the corporation in all matters concerning its interests and the management of its business, and generally perform such duties and exercise such powers as may be directed or delegated by the Board of Directors from time to time. The Board may delegate to such Committee authority to exercise all the powers of the Board (excepting power to amend the by-laws), while the Board is not in session. Subject to the provisions of Section 2 of this Article vacancies in the membership of the Committee shall be filled by the Board of Directors at a regular meeting or at a special meeting called for that purpose. The Executive Committee shall keep regular minutes of its proceedings and report the same to the Board when required.

Section 2. Four members of the Committee shall constitute a quorum. If a quorum be not present at any meeting, the member or members of the Committee present may adjourn the meeting until a later day or hour, and a minute [fol. 82] of such adjournmene shall be entered on the records; or the member or members present, whether consti-

tuting a quorum or not, at his or their option, shall have the power to appoint a substitute or substitutes from the members of the Board of Directors to act during the temporary absence of any member or members of the Committee.

Article VI

Officers

Section 1. The Board of Directors at its first meeting after each annual meeting of stockholders shall organize by the election by ballot from their own number of a President and by the appointment of a Secretary, an Assistant Secretary, a Treasurer and Assistant Treasurers who need not be members of the Board. The Board of Directors may also from time to time appoint such additional assistant secretaries and such additional assistant treasurers, to perform specific duties, as it may deem necessary.

Section 2. The Board of Directors may also appoint such Vice-Presidents and other officers, agents and factors as the Board may from time to time deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board.

Section 3. The Board of Directors or the Executive Committee may designate any Vice-President to act as President in case of the absence or disability of the President.

Section 4. The Board of Directors shall have power at any time to remove any officer and this by-law shall form a part of the contract with every officer.

Article VII

President

The President shall be the chief executive officer of the corporation. He shall preside at all meetings of the Board of Directors and shall call meetings of the Board of Directors whenever he deems it advisable. He shall have, subject to the Board of Directors, and the Executive Commit-
[fol. 83] tee, general supervision and management of the property and business of the corporation.

Article VIII

Secretary

Section 1. The Secretary shall attend all meetings of the Stockholders and of the Board of Directors and of the Executive Committee. He shall keep an accurate record of the proceedings at such meetings and shall notify the several officers of the corporation of action taken concerning matters in their respective departments. He shall be custodian of the seal of the corporation. He shall give or cause to be given notice of all meetings of the stockholders and of the Board of Directors and shall perform such other duties as may from time to time be prescribed by the Board of Directors or by the President. He shall be sworn to the faithful discharge of the duties of his office.

Section 2. In the absence or disability of the Secretary, the Assistant Secretary shall perform the duties of the Secretary and shall perform such other duties as may be assigned to him by the Secretary or by the President.

Article IX

Treasurer

Section 1. The Treasurer shall have the custody of the corporate funds and securities of the corporation. He shall collect and receive the operating revenues and miscellaneous accounts of the corporation and shall deposit the same in such banks or places of deposit as the Board of Directors may from time to time designate. He shall show the disposition of all moneys that may pass through his hands, in books belonging to the corporation kept for that purpose. He shall disburse the funds of the corporation as may be ordered by the Board of Directors, taking proper voucher for such disbursements. He shall make such reports to the Board of Directors and to the President of the transactions of his office as shall be called for, and shall perform such other duties connected with the finances of the corporation as may from time to time be assigned to him by the Board of Directors.

[fol. 84] Section 2. He shall keep and have the custody of the stock book of the corporation and shall transfer all stocks and bonds of the corporation.

Section 3. He shall give a bond with one or more sureties, conditioned upon the faithful discharge of his duties, which bond and the amount thereof shall be approved by the Board of Directors or by the President.

Section 4. The Assistant Treasurers shall severally act for the Treasurer during the absence or disability of that officer, and shall perform such other duties as may be required *by* them by the Treasurer or by the President, and shall each give a bond, with one or more sureties, conditioned upon the faithful discharge of his duties, which bonds and the amounts thereof shall be approved by the Board of Directors or by the President.

Article X

Amendments

These By-laws may be altered or amended by the affirmative vote of a majority of the stock issued and outstanding and entitled to vote at any regular or special meeting of stockholders, if notice of the proposed alteration or amendment be contained in the notice of the meeting, or by the affirmative vote of a majority of the Board of Directors if the alteration or amendment be proposed at a regular or special meeting of the Board and adopted at a subsequent regular meeting; provided, however, that no alteration or amendment be made in the number of directors of this corporation or in the method of nominating the directors of this corporation except by the affirmative vote of two-thirds of the stock issued and outstanding and entitled to vote; and provided, further, that no change of the time or place for the election of directors shall be made within sixty days next before the day on which such election is to be held, and that in case of any change of such time or place, notice thereof shall be given to each stockholder in person or by letter mailed to its last known post-office address at least twenty days before the election is held.

[fol. 85] EXHIBIT D TO PLAN

Express Operations

Agreement Between —— —— and Railway Express Agency, Incorporated

Effective March 1, 1929

This agreement, made as of March 1, 1929, between —— ——, hereinafter called the "Rail Company", and the Railway Express Agency, Incorporated, a corporation of the State of Delaware, hereinafter referred to as the "Express Company", witnesseth:

Whereas, the Rail Company has united with other carriers operating railroads in the continental United States to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business; and

Whereas, the Express Company has been organized as the joint express agency or facility of the Rail Company and other carriers uniting as aforesaid, all of which have undertaken to enter into agreements with the Express Company identical herewith:

Now, therefore, for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

[fol. 86] Article I

Definition

Sec. 1. The express transportation business to be carried on under this agreement is understood to mean such express transportation business as was carried on by the American Railway Express Company under the contract known as the "Amended Uniform Contract for Express Operations" effective March 1, 1923; together with transportation of property, under the conditions provided in Section 3 of Article II hereof, by means of the instrumentalities named therein. The maximum weight to be carried in any of the

carscarrying express business shall not exceed a limit which in the judgment of the Rail Company is necessary for safety. Articles which can only be loaded and unloaded through end doors of express or baggage cars, causing delays to passenger trains in switching for this purpose, shall not be accepted by the Express Company unless a special car is furnished and charged for as a carload shipment, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Rail Company; Provided, however, that nothing in this section contained shall be construed to prevent the Rail Company from performing any transportation service required by any present or future law.

Sec. 2. Said express transportation business shall be conducted under such rates, charges, classifications, divisions, rules, regulations, and practices and subject to such limitations and conditions as are now or may hereafter be lawfully established, provided: (*a*) that, where car-load rates are made for express matter, the minimum weight shall not be less than at the time prescribed by the railway companies for freight, unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company; and (*b*) that rates per 100 pounds made for express matter shall not be less than twice the prevailing class freight rate, between the same points, and in no event less than twice the prevailing first class freight rate unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company.

[fol. 87] Article II

Appointment of Agent

Sec. 1. The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxilliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by

the Rail Company, and (b) for the collection and disbursement and or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained. All classifications, tariffs and other rules or regulations relating to the transportation of express

Filing of Tariffs

matter required or permitted to be filed with the Interstate Commerce Commission or other public body may be filed by the Express Company on its own behalf and or on behalf of the Rail Company and other carriers with which the Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose or filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter.

Exceptions in Transportation

Sec. 2. The Rail Company further agrees that it will not for compensation knowingly transport valuables, money, goods or property of any description independently of the provisions of this agreement, or permit its officers, agents or employees to do so on any of its passenger, express or mail trains, except as follows:

(a) Where, under the terms of the "Amended Uniform Contract for Express Operations" effective March 1, 1923, the Rail Company was entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or [fol. 88] express trains, the Rail Company hereby reserves such exclusive or joint right as to such commodity under this agreement.

(b) Where the Rail Company serves written notice upon the Express Company of its election to suspend the agency of the Express Company to transport property in carload shipments, as defined in Section 1 of Article V hereof, in which event and unless and until such election shall be re-

voked the Rail Company may move such carload shipments in its passenger, express or mail trains independently of the provisions of this agreement.

The Rail Company reserves the right to transport any property independently of this agreement by means of motor truck, aircraft or any other instrumentality than railroad train, and to perform in connection therewith the auxiliary service commonly known and referred to as pick up and delivery.

Sec. 3. The Express Company may engage by means of motor truck, aircraft or any other instrumentality than railroad train, in the transportation of property which would otherwise be transported on trains of the Rail Company, but only with the consent of the Rail Company and of all other carriers executing this form of agreement which would participate in such transportation if conducted by railroad; provided that any such consent may be withdrawn by not less than six months written notice; and provided further that as to any transportation by motor truck or aircraft conducted by the American Railway Express Company on February 28, 1929, the consent hereinbefore required shall be assumed unless and until such assumed consent shall be withdrawn or terminated by not less than six months written notice.

Lines not under Agreement

Sec. 4. The Express Company may arrange, or continue, where necessary for the proper conduct of its business, to compensate stage lines, water lines, short line railroads and electric lines, and transportation lines in Cuba, Hawaii, Alaska, Mexico and Canada, on tonnage, flat rate or such other basis as may be most economical.

[fol. 89] Article III

Cars

Sec. 1. The Rail Company shall as soon as practicable furnish space in cars, adequate in number and suitable for use in passenger, mail, or express train service at passenger train speed; said cars to be properly heated and lighted,

and lettered "Railway Express Agency, Inc."; and shall transport

Trains

said cars on such passenger, mail, or express trains as may be agreed to, from time to time, as necessary to meet the reasonable requirements of the public for express service. The Rail Company shall carry in such cars the express matter, with the safes, packing trunks, and train supplies and equipment of the Express Company, together with the

Equipment

messengers, helpers and guards of the Express Company, necessary for the handling of such express matter to destination or to the proper transfer points.

Special Trains

Sec. 2. Special express trains, if run by the Rail Company, shall be run without extra compensation to the Rail Company.

Baggage Cars

Sec. 3. In order that the Rail Company may not be required to run more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Rail Company to the greatest extent practicable, and the Rail Company shall likewise have the right to use any unoccupied space in any car supplied by the Express Company.

Rented Cars

Sec. 4. Whenever the Express Company to meet emergency shipments is obliged to rent live stock, refrigerator, [fol. 90] or other cars to handle such shipments by reason of suitable cars not being available on the railroad on which the traffic originate, the Rail Company agrees that it will assume the entire rental payment for such cars when the shipment moves exclusively over its lines; and when the movement is partly over its lines and partly over the lines of one or more other railroads the Rail Company shall as-

sume such part of the rental charge as the proportion of the express revenue on the shipment earned on the Rail Company's lines bears to the total express revenue on the shipment; provided, however, that where shipper is required to pay an additional charge for such rented equipment, the rail companies involved will be credited with such additional charge.

Train Stops

Sec. 5. The Rail Company agrees to stop its trains at stations where they are scheduled to stop in such a manner and for such time as will permit the Express Company by due diligence, and with sufficient force, to load on and to unload from trains all express matter carried or to be carried on such trains as will not unreasonably interfere with other business of the Rail Company, and, under like conditions, the Rail Company shall provide the Express Company, without compensation other than that provided in

Access to Stations and Terminals

Articles IV and V, access to and from station platforms, trains and terminals, for its employes, vehicles and other conveyances for the handling, loading and unloading of property or express matter carried or to be carried on trains of the Rail Company. Nothing in this agreement shall operate to interfere with the performance by the Rail Company of any of its obligations in respect to the carriage of the United States mails.

Article IV

Use of Station Building

Sec. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences, such as heat, light, and use [fol. 91] of telephone at station, without charge to the Express Company, except as otherwise provided in Section 2

of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.

Rented Rooms

Sec. 2. When separate rooms for use of the Express Company in stations and terminal buildings of the Rail Company are provided by agreement between the said companies, the Express Company shall pay to the Rail Company as rental therefor (monthly) upon the following basis:

The cubical content of the building, or of the separate wing or annex, in which the express room or rooms are provided shall be ascertained, and also the cubical content of such room or rooms and the proportion of the latter to the former shall constitute the basis of rental to be paid by the Express Company at 6 per centum per annum of the original cost (estimated if not known) of said building, separate wing or annex and of additions and betterments thereto, and of the appraised value of the land thereunder, and the appraised value of the land used for driveways adjacent to the Express Company's room or rooms, and of platforms on property of the Rail Company contiguous to such room or rooms, when such driveways or platforms are used exclusively by the Express Company.

The Express Company will also pay for the repairs and maintenance (including a reasonable supervision charge) of such platforms and driveways, and also of elevators used exclusively by the Express Company and located in a room or rooms rented by it upon the foregoing terms.

The Express Company will also pay to the Rail Company the cost (including a reasonable supervision charge) of all necessary repairs to the room or rooms so rented, and an amount for general repairs, such as roofing, painting, etc., to the entire building, wing, or annex in which located, in proportion to the cubical content of the express room to the cubical content of the building, wing or annex as aforesaid.

The Express Company, in like proportion, will pay to the Rail Company, insurance, taxes and assessments upon its quarters, such assessments to be equitably apportioned according to the benefit accruing to the Express Company for the term of its occupancy of said space, and also the cost

(including a reasonable supervision charge) of light, heat [fol. 92] and water when supplied to the Express Company, except that the direct cost (including a reasonable supervision charge) shall be paid when ascertainable.

Exclusive Buildings Owned by Rail Company

Sec. 3. In cases where the Rail Company by agreement with the Express Company provides or erects a separate station or terminal building on the right of way or other property of the Rail Company for the use of the Express Company, it is agreed that the rental to be charged to the Express Company shall be equivalent to six per centum per annum upon the appraised value of the land and the original cost of the building and betterments and additions thereto, with the understanding that the Express Company shall assume the cost of all necessary repairs and an equitable proportion of insurance, taxes, and assessments, and of the cost of heat, light or water when supplied to the Express Company.

Buildings Erected by Express Company

Sec. 4. In cases where it is agreed with the Rail Company that the Express Company itself shall erect a separate or distinct station or terminal building on the Rail Company's property, the Rail Company agrees that it will lease to the Express Company at a rental of 6 per centum per annum of the appraised value of land (plus taxes), with a minimum rental of five dollars per annum, including taxes, land suitably situated for this purpose; and if the Express Company shall cease to do express business on the lines of the Rail Company, or if the land is required by the Rail Company for other purposes, the Rail Company shall purchase from the Express Company such buildings so erected at cost, less depreciation, at the time that the Express Company vacates them.

The Rail Company further agrees that in the event the Express Company shall cease to do express business on the line of the Rail Company, or if the land is required by the Rail Company for other purposes, it will then purchase any buildings then owned by the Express Company heretofore erected on the land of the Rail Company at the cost of such

building less depreciation at the time that the Express Company vacates them.

[fol. 93] Union Station or Terminals

Sec. 5. The Rail Company further agrees that it will use its influence to secure for the Express Company, convenient and adequate office or warehouse facilities, if desired, for the transaction of its express business in union depots or stations in which the Rail Company has or may have arrangements for terminal facilities during the existence of this agreement, on substantially the same terms and conditions as if the union depots or stations were owned by the Rail Company.

Sec. 6. All leases entered into between the Rail Company and the Express Company under this Article shall be in accordance with the provisions of this agreement relating to liability as defined in Articles VII and XI hereof.

Sec. 7. All switch tracks, side tracks and other tracks used or furnished for handling express business shall be considered as railroad facilities furnished by the Rail Company for the compensation provided in Article V of this agreement, and without other compensation or charge.

Article V

Compensation

In addition to other payments herein provided for the Express Company shall account to the Rail Company, as hereinafter in this Article provided.

Sec. 1. Upon carload shipments consigned from one consignor to one consignee at one destination, moving under rates which exclude vehicle service, the Express Company shall first pay to the Rail Company 85 per centum of the gross revenue accruing on its lines from the rail haul (not including in the gross revenue from the rail haul any charges separately ascertainable for refrigeration, partial loading or unloading in transit and other accessorial services), the remaining 15 per centum of such gross revenue from the rail haul, together with the charges for any separate vehicle service, refrigeration, partial loading or un-

loading in transit and other accessorial services, shall remain in the revenue of the group (item (*a*), Sec. 4, of this Article) in which such charges accrue.

Sec. 2. The railroads and other carriers on the lines of [fol. 94] which the Express Company conducts operations shall be divided into the groups described as follows, except as any line or lines may hereafter be assigned to a different group by the Interstate Commerce Commission in its grouping for rate making purposes:

Grouping of Transportation Lines

(A). Eastern Group—Including generally the carriers operating in the territory embraced in the following limits: the Atlantic seaboard from the Canadian border to Norfolk, Va., the main line of the Norfolk & Western railway from Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio railway from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Ill., the Mississippi River to the mouth of the Illinois River, at or near Grafton, Ill., the Illinois River from Grafton, Ill., to Pekin, Ill., a line south and east of the Atchison, Topeka and Santa Fe Railway from Pekin, Ill., through Joliet and Streator, Ill., to Chicago, Ill., a line drawn from Chicago, Ill., to include the southern peninsula of Michigan, and thence following the international boundary to the Atlantic seaboard; including that portion of the Virginian Railway extending south of the southern boundary (excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line extending north of the southern boundary), and all other carriers mentioned in Exhibit A hereto, whether located in the United States or not, and any other lines located in the territory covered by the Eastern Group over which the Express Company may hereafter operate.

(B). Southern Group—Including generally the carriers operating in the territory commonly known as the southern classification territory, embracing that section of the United States lying west of the Atlantic Ocean; south of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Ches-

apeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Ill.; thence east of the Mississippi River to New Orleans, La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile and Ohio Railroad, Atlantic Coast Line Railroad, [fol. 95] and Seaboard Air Line Railway extending north of the northern boundary (excluding that portion of the Virginian Railway extending south of the northern boundary), and all other carriers mentioned in Exhibit B hereto, whether located in the United States or not, and any other lines located in the territory covered by the Southern group over which the Express Company may hereafter operate.

(C). Western Group—Including generally the carriers operating in the territory lying west of the Western boundaries of the eastern and southern groups as above described; south of Lake Superior and of the international boundary line; north of the Gulf of Mexico and the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the state of North Dakota and the state of Montana and the boundary line between the states of South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo, and Trindad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, New Mexico, to Albuquerque, New Mexico; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Texas, and all other carriers mentioned in Exhibit C hereto, whether located in the United States or not, and any other lines located in the territory covered by the Western Group over which the Express Company may hereafter operate.

(D). Mountain-Pacific Group—Including generally the carriers operating in the territory lying between the north and south line, described in paragraph (C) hereof, and the Pacific Coast, a-so carriers operating in Alaska, Hawaii, British Columbia, the Yukon and Mexico, and all other car-

riers mentioned in Exhibit D hereto, whether located in the United States or not, and any other lines located in the territory covered by the Mountain-Pacific Group, over which the Express Company may hereafter operate.

The lines embrace- din the several groups are more particularly set forth in Exhibits A, B, C and D, attached hereto and made a part of this agreement, it being understood [fol. 96] that said Exhibits shall prevail in case of any minor departures contained therein from the geographical descriptions of groups above given.*

Apportionment of Express Revenues

Sec. 3. The gross express transportation revenues accruing on each railroad or other carrier in the several groups, including the lines of the Rail Company party to this agreement, shall be ascertained by crediting each railroad or other carrier with the express revenue earned wholly thereon and prorating the revenue accruing between points, involving transportation on the lines of two or more carriers, as follows:

Through Revenues

The gross transportation revenues accruing from the carriage of express matter on the line of the Rail Company when carried by the Express Company partly on and partly beyond the line of the Rail Company, where rates applicable to rail transportation apply, shall be such portion of the through transportation charge of the Express Company as the local first class express rate per 100 lbs. between points where carried on the line of the Rail Company bears to the sum of the local first class express rate per 100 lbs. between where carried on the several lines or routes operated by the Express Company over which such express matter moved.

Sec. 4. When used in this Section and in Sections 5 and 6 of this Article—

The term "Uniform System of Accounts" means the Uniform System of Accounts for Express Companies, now

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* In the contract for execution these exhibits omitted from this draft will be included.

or hereafter prescribed by the Interstate Commerce Commission.

The term "Classification" means one of the several groups of accounts embraced in the Uniform System of Accounts, such as the Classification of Operating Revenues.

The term "Form of Income Statement" means the form for stating income accounts embraced in the Uniform System of Accounts.

The term "Carload Business" means that carload business which is described in Section 1 of this Article.

All references in this Sections to classifications, captions, [fol. 97] names and numbers of accounts and forms of statements mean the classifications, captions, names and numbers of accounts and forms of statement as embodied in the Uniform System of Accounts, issue of 1914.

There shall be ascertained the following items of income accruing from express operations on the lines of all railroads and other carriers or instrumentalities of transportation over which or by means of which the Express Company performs service within each group for each month during which this agreement shall remain in effect. Such items of income shall be as defined in the Uniform System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, viz.:

(a) Total charges for transportation (including charges based upon value), less amounts paid by the Express Company under Section 5, Article XVI, hereof, not included in operating expenses, and less the 85 per centum of carload revenue payable by the Express Company under Sec. 1 of this Article. This item shall include the operating revenues of the Express Company as defined in General Account I "Transportation" in the Classification of Operating Revenues, after deducting the 85 per centum of carload revenue referred to herein.

(b) Total revenues from Operations other than Transportation. This item shall include operating revenues of the Express Company as defined in General Account III, "Operations Other than Transportation" in the Classification of Operating Revenues.

(c) Other Income. This item shall include all other income of the Express Company.

(d) Profit and Loss Credits. This item shall include the following accounts:

403. Profit on Real Property and Equipment Sold.
404. Delayed Income Credits.
405. Unrefundable Overcharges.
406. Miscellaneous Profit and Loss Credits.

From the total of items (a) to (d) inclusive, shall be deducted the following charges and items of expense as defined in the Uniform System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, for the group for the same period:

[fol. 98] (e) All Operating Expenses of the Express Company, including depreciation and the several payments, expenses and indemnities undertaken by the Express Company referred to in Articles IV, VII, VIII, IX, X, XI and XVII.

The depreciation above shall be at the rates used on February 28, 1929, by the American Railway Express Company or as fixed hereafter by action of the Board of Directors of the Express Company, or by the Interstate Commerce Commission.

(f) Compensation to carriers, over the lines of which the Express Company operates, not parties to this form of agreement.

(g) Uncollectible Revenue from Transportation.

(h) Express Taxes.

(i) Other Deductions. This item shall include accounts listed under Caption III, "Deductions from Gross Income" and under Caption IV "Disposition of Net Income" except Account 329 entitled "Dividend Appropriations of Income" in the form of Income Statement.

NOTE.—Included in this item shall be the amount paid or sustained, if any, as interest and discount on funds borrowed and expended by the Express Company to acquire any of the properties of the American Railway Express Company and/or additional property and equipment necessary for use in the express business.

(j) Profit and Loss Debits. This item shall include the following accounts:

409. Surplus Applied to Sinking and other Reserve Funds.
411. Surplus Set Aside for Investment in Physical Property.
413. Debt Discount Extinguished Through Surplus.
414. Miscellaneous Appropriations of Surplus.
415. Loss on Land.
416. Delayed Income Debits.
417. Miscellaneous Profit and Loss Debits.

NOTE.—The basis for the apportionment among the groups affected, of operating expenses and other charges, [fol. 99] included in items (e) to (j) inclusive, which are common to more than one group, shall be the basis in effect on February 28, 1929, under the Amended Uniform Express Contract or as may be hereafter determined by the Board of Directors of the Express Company.

Rail Transportation Revenue

The balance remaining shall be designated as "Rail Transportation Revenue" and shall be distributed among the carriers in the group executing this form of agreement, including the Rail Company party to this agreement, in the proportion that the gross express transportation revenues on other than carload business for the month earned on the line of each such carrier bears to the gross express trans-

Apportionment

portation revenues on other than carload business earned on the lines of all such carriers in that group for that month.

Payment

SEC. 5. The Express Company shall estimate as nearly as may be the amount payable to the Rail Company as its monthly proportion of the "Rail Transportation Revenue," under Section 4 of this Article, and shall pay to the Rail Company on or before the last day of each month the amount so estimated to be due as a result of operations of the previous month. The actual amount due for each such month shall be ascertained by the Express Company as early as may be, and payment of any balance remaining

due thereon shall be made to the Rail Company within 120 days after the close of such month. If the actual amount due the Rail Company for the business of such month shall be less than the amount already paid by the Express Company under the provisions of this paragraph, the Express Company shall have the right to deduct the amount of such overpayment from the next or any succeeding payment due to the Rail Company hereunder.

Settlement at Termination of Agreement

After the accounts for any month have been closed they shall not be reopened to include adjustments affecting such month, unless in the judgment of the Board of Directors of the Express Company, the amount of such proposed adjust-
[fol. 100] ment is sufficiently large to warrant such reopening and the restatement of the accounts. Other necessary adjustments in the accounts under this Article shall be included in the first current open month's accounts after discovery which will admit of their inclusion without delay to the rendering of that month's accounts.

With respect to any and all claims, demands, charges and expenses of every kind and character whatsoever, for which the Express Company may be or become liable, or earnings in which the Rail Company may be interested, arising or growing out of the express business on the Rail Company's lines, but not ascertained, definitely fixed, or charged on the Express Company's books at the termination of this agreement, in the final settlement between the parties hereto, such claims, demands, charges, expenses or earnings shall be estimated and allowed as may be determined by the General Accounting Officers of the parties, and in case of their failure to agree, shall be determined as provided in Article XIV hereof.

Article VI

The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the Rail Company; and in the conduct of said business shall exert itself in all proper ways to make

said business satisfactory to the public and to the Rail Company.

Article VII

As between the Rail Company and the Express Company, the Express Company shall be liable:

(a) For any and all claims on account of loss of, or damage or delay to, its own property, or the property of others in its charge carried under the provisions of this agreement:

(b) For any and all injury to, or death of, its agents or employes while engaged in its business on any of the lines or premises covered by this agreement;

(c) For any and all damage to property other than that mentioned in paragraph (a) of this Article (except as otherwise provided in this agreement as to any particular [fol. 101] property), and for injury to, or death of, other persons than those mentioned in paragraph (b) of this Article, where such damage, injury or death is due to or caused by the act or negligence of the Express Company, its officers, agents, or employees; provided, however, that in claims for such loss, or damage, or injury to such property, or injury to, or death of, such other persons, where it appears that the loss, or damage, or injury, or death was caused by the joint act or negligence of/ the Express Com-

Liability

pany and the Rail Company, the responsibility shall be joint, and in such event any loss shall be borne in proportion to the extent to which the act or negligence of each party contributed to produce the loss, damage, injury, or death; and in case of disagreement between the parties hereto arising out of the application of this proviso, such disagreement shall be settled by arbitration, as hereinafter provided.

The Express Company shall indemnify and save harmless the Rail Company or any agent or employee of the Rail Company against all claims, demands, suits and actions whatsoever, including expense of litigation, that may be begun against any of the same on account of any claim aris-

ing or growing out of liability assumed by the Express Company under this Article whether in law or in equity or before any compensation board, tribunal, or court whatsoever.

Article VIII

Service of Rail Companies

The Rail Company shall have the right to require the transportation without charge by the Express Company, so far as the Express Company may lawfully carry without charge, over any and all lines of the Rail Company, and over lines of any generally recognized transportation system of which the Rail Company is a part and over which lines the Express Company has an agreement or agreements in the form hereof, of all packages of money, valuables, papers, and shipments of materials and supplies ordinarily forwarded by express, used in the operation of the Rail Company: Provided, however, that the Express

[fol. 102] Liability

Company shall not be liable for any loss of or damages to such shipments so carried unless caused by the theft, dishonesty, negligence or other wrongful act of the employees of the Express Company. When the Express Company and the Rail Company employ the same agents, the receipt of the express messenger on the train for railway property shall constitute a delivery to the Express Company and the receipt of the party to whom the package may be addressed or his representative shall constitute a delivery by the Express Company.

Article IX

Service for Express Company

The Rail Company shall, so far as it lawfully may, transport upon the passenger and express trains of its lines, free of charge, the Express Company's messengers, helpers and guards, and shall carry on trip passes to be issued by the Rail Company on proper application therefor, the agents and emloyees of the Express Company when engaged in

conducting and handling the express business passing over the lines of the Rail Company, subject to the same rules and regulations as govern the free or reduced rate transportation of the agents and employees of the Rail Company; and officers having supervision of express business on lines of the Rail Company will be provided with annual passes on proper application therefor. The Rail Company shall also transport without charge any express matter that the Express Company may be now or hereafter privileged by law or authority of the Interstate Commerce Commission, or other body having jurisdiction, to carry free. It shall also transport free of charge upon the freight trains of its line, within reasonable distances, the equipment, material and supplies (excepting hay, grain and gasoline) of the Express Company required for use by it on such lines. It shall, so far as it lawfully may, also transport free of charge, equipment, stationery and office supplies of the Express Company in cars or parts of cars set apart for the use of the Express Company.

Liability

The Express Company assumes the risk of loss, damage or injury resulting from all such transportation, and agrees to indemnify and save [fol. 103] harmless the Rail Company from all claims for loss, damage or injury, including expense of litigation, arising from such transportation.

Article X

Telegraph or Telephone

The Rail Company shall transmit so far as it may be free to do so, without charge, over all telegraph or telephone lines owned or controlled by the Rail Company, business messages relating to the express transporation business of the Rail Company conducted by the Express Company: Provided, however, that the Express Company releases and holds harmless the Rail Company from all liability arising from any error or delay in the transmission of such messages or from failure to forward and deliver the same.

Article XI

Joint Employees

Sec. 1. The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, and the Rail Company may arrange with the Express Company for the

Rules

agents and express messengers and others employees of the Express Company to act as station or train employees of the Rail Company, subject to the rules of the Rail Company, upon such terms as may be agreed upon by the two companies.

Liability

Sec. 2. In case any injury, loss or damage is caused by a joint employe while engaged exclusively in the service of one of the parties hereto, liability therefor shall, as between the parties hereto, be exclusively the liability of the party in whose service such joint employe was at the time engaged.

In case it cannot be determined whether, at the moment, such joint employe was engaged exclusively in the work of either of the parties hereto, then the Express Company and [fol. 104] the Rail Company shall jointly assume liability and bear the costs and expenses of settlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, and in such case no settlement shall be made by either party without the consent in writing of the other.

Liability

Sec. 3. Liability for personal injury to or death of any joint employees, when it can be determined that such injury or death was sustained while the employe was engaged exclusively in express service, shall be borne by the Express Company, and the Express Company shall bear all costs and expenses incident to the settlement thereof. When it can

be determined that such injury or death was sustained while the employe was engaged exclusively in railroad service, the Rail Company shall assume liability and bear all costs and expenses incident to the settlement thereof. In case of injury or death, where it cannot be determined whether at the moment the joint employe was employed in work exclusively for the Rail Company or exclusively for the Express Company, the Express Company and the Rail Company shall jointly assume liability and bear the cost and expenses of settlement in the proportion in which the wages paid at the time of the injury by each bear to the total wages, in which latter case no settlement shall be made by either party without the consent of the other in writing.

Article XII

Loading and Unloading

The Express Company shall load and unload express matter transported under this agreement, or require the shippers and consignees to do so.

Article XIII

Rules

All of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and in case any messenger or other employe on any said lines shall from any cause be objectionable to the Rail Company, he shall be removed or discharged upon the written [fol. 105] request of the Rail Company or of the Rail Company's principal operating representative.

Article XIV

Any disagreement which may arise as to this agreement or as to any matter or question growing out of the same as between the parties hereto, including any disagreement between the Rail Company and the Board of Directors of the Express Company concerning the decision of any complaint provided for in Article XVIII hereof, or as between members of any group or the members of one group and of any

other group or groups in respect of any subject matter involved herein, may be submitted for dispostion to the determination of the Interstate Commerce Commission, or upon request of any party involved in any such disagreement shall be arbitrated. In the event of arbitration each party (including as one all parties having a common interest) to such arbitration shall select one arbitrator and the two so chosen if they cannot agree shall select a third arbitrator and the decision by a majority of such arbitration board shall be a condition precedent to any further action; provided, however, that if either party fails to select an arbitrator within thirty days after notice from the other of a desire to submit a matter to arbitration, the party not in default as to the appointment of an arbitrator shall have the right to appoint an arbitrator for the party in default and the two thus chosen shall chose a third. If two arbitrators selected as herein provided shall fail for thirty days, where necessary, to select a third, the third may, upon the application of either party, be selected by the Chairman of the Interstate Commerce Commission. In any such arbitrations each party shall pay the expense of its own arbitrator and all other cost thereof shall be divided equally.

Article XV

Car Mileage

The Rail Company shall allow the Express Company, under the rules of the American Railway Association or similar body, the usual mileage or per diem rates on all cars owned, cased, rented or controlled by the Express Company [fol. 106] moving over the railroad lines operated and controlled by the Rail Company.

Article XVI

Switching Cars

Sec. 1. The Rail Company agrees to provide, without compensation other than as provided in Article V of this agreement, all switching of cars in express service, such as

ordinary switching in connection with regular or special trains at stations or union depots, and also to and from tracks or sidings for the handling of express traffic at stations or union depots and delivery of cars to connecting railroads.

Switching Live Stock

Sec. 2. The Rail Company also agrees to provide, without compensation other than as provided in Article V of this agreement, all necessary switching of cars for icing in transit, also switching of cars for live stock in transit to and from stock chutes or stock yards for loading, unloading, feed, water, or rest.

Terminal and Belt Line

Sec. 3. When, in transferring cars in express service to another contract line, it is necessary to switch such cars over terminal, belt, or short line railroad because of the lack of the Rail Company's physical track connection with the other contract line, the cost of such switching shall be paid by the transferring Rail Company.

Sec. 4. When, in order to handle express matter to and from a point contiguous to the end of the rail line, or to reach the lines of a connecting railroad, it is necessary to use a bridge, ferry, float or lighter service, the bridge and ferry tolls and float or lighterage charges shall be borne by the originating, delivering, or transferring Rail Company as the case may be.

Bridges, Ferries and Lighters

Sec. 5. All switching, ferrying, float or lighterage referred to in the foregoing Sections 1, 2, 3 and 4 will apply only when such switching, ferrying, float or lighterage has [fol. 107] to do with the usual transportation by the carrying line to or from or between the points where the rate applies under which the carrying line handled the shipment. For all special switching, ferry, float or lighterage service, performed for the Express Company, it shall pay such reasonable charge as the Rail Company may establish.

Sec. 6. Adequate charges for demurrage on cars carrying carload traffic, so far as it lawfully may be done, shall be as-

sessed by the Express Company, in order to insure the prompt loading and unloading of express matter to and from cars on the line of the Rail Company and payments of such charges accrue to the Rail Company.

Article XVII

Refrigeration

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Rail Company shall be performed by the agency employed by the Rail Company for this purpose, for account of the Express Company, the Rail Company agreeing that the charges for such service shall be reasonable.

Article XVIII

Competitive Traffic

To insure and preserve a proper and equitable proportion of all competitive business to the Rail Company and to other carriers having similar agreements with the Express Company, the latter Company agrees to divide the competitive traffic upon a fair and equitable basis between the said carriers, giving due consideration to the distribution of competitive traffic enjoyed by them during the three years ending December 31, 1928, and to the elements of service, direct routing, car supply and terminal facilities. To establish and preserve co-operation between the parties hereto, and also between them and the other carriers that may enter into similar agreements, the Express Company agrees that records and statistics relating to the division of competitive traffic shall be kept by the Express Company and shall be subject to inspection for and on behalf of the Rail Company.

The accounts of the Express Company shall be kept in the form and manner now or hereafter prescribed in the ac- [fol. 108] counting orders of the Interstate Commerce Commission, and the Rail Company, and such other carriers as shall enter into a similar agreement with the Express Company, shall have the right to inspect such accounts at any and all reasonable times through their duly authorized

agents, and the Rail Company and such other carriers as may become parties to a similar agreement with the Express Company may from time to time at their own expense require the Express Company to furnish such special statistics or special statements as may be required in connection with the operations under this agreement.

To avoid unnecessary interruption of the express business by having each carrier inquiring into the accounts and operations of the Express Company and requiring statements and statistics, to insure equitable treatment to all the carriers, to provide for the hearing and decision of complaints by any carrier concerning the manner in which the provisions of this agreement are being observed or administered by the officers of the Express Company, and to make such provisions effective, the Board of Directors of the Express Company may create committees members of which need not be directors so constituted as to be fairly representative of the carriers as a whole. The committees so created shall have jurisdiction to investigate the operation and administration of this and similar agreements with other carriers, and to make recommendations to the Board of Directors, who shall have power to act thereon (within the terms and intent of this agreement) in respect to matters relating to:

(A) Routing of competitive traffic;

(B.) Rates, charges, classifications, divisions, rules, regulations, practices and other traffic matters;

(C) Facilities, equipment, lading, economies in movement of express business and similar operating matters;

(D) Allocation and apportionment of revenues and expenses, accruals and depreciation rates, accounts and statistics, as contemplated in this agreement.

The Rail Company, acting independently or in conjunction with other carriers having similar agreements, if dissatisfied with the manner in which the provisions of this agreement are being observed or administered by the officers of the Express Company may submit its or their complaint to the Board of Directors of the Express Company, [fol. 109] who shall decide the same after investigation

through one of its aforesaid committees. If the decision is not acceptable to the Rail Company or Companies affected thereby, it or they may have such matter determined as a disagreement under Article XIV of this agreement.

The several items of income, expenditures and deductions under Section 4 of Article V of this agreement shall, within a reasonable time, be subject to the objection of the Rail Company as to the nature or amount thereof, and if any differences continue to exist after consideration in respect thereto by the Board of Directors and the Committee having jurisdiction of matters mentioned under Clause (D) above, such differences shall be determined by arbitration under the provisions of Article XIV of this agreement. In the absence of fraud or concealment on the part of the Express Company, no objection contemplated by this Article, in so far as it relates to actual expenses already paid or incurred being unnecessary or excessive, shall be given a retroactive effect to a date earlier than the date such objection, after being stated in writing to the Express Company, may be reasonably and practically complied with, but estimates and accruals when found by the Committee acting under Clause (D) above, and agreed to by the Express Company, to be excessive shall be adjusted from the dates of such estimates and accruals.

Article XIX

The Express Company hereby agrees from time to time to take or unite with the Rail Company and other interested carriers in taking such action to secure just and reasonable express rates as may at any time become necessary either before the Interstate Commerce Commission or before the several state commissioners, or both.

Article XX

All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and shall take effect on March 1, 1929, and shall continue in force until midnight on February 28, 1954.

Article XXI

All of the benefits and obligations hereof shall inure to and be binding upon the successors and assigns of the parties hereto, and it is further agreed that this agreement and [fol. 110] all rights of the Express Company hereunder may be mortgaged or pledged as security for any notes, debentures or other obligations which may be issued by the Express Company.

In witness whereof the parties hereto, by their proper officers thereto duly authorized, have respectively executed these presents in duplicate as of the day and year first above written.

Railway Express Agency, Incorporated, by —— ——.
Attest: —— ——, Secretary. —— ——, by —— ——. Attest: —— ——, Secretary.

I, Henry W. Clark, member of the Legal Committee which prepared the foregoing report and plan for future conduct of express business, dated June 21, 1928, and Assistant Secretary of Railway Express Agency, Incorporated, hereby certify that the foregoing is a true copy of the plan adopted by the participating rail lines for the operation of the express business beginning March 1, 1929, and as approved in its essential features by the Interstate Commerce Commission in Finance Docket No. 7322, decided February 11, 1929.

Dated, February 23, 1929.

Henry W. Clark. (Seal.)

Application in writing of the Railway Express Agency, Incorporated, for certificate to do business in Virginia. (Plea.)

[fol. 111] BEFORE STATE CORPORATION COMMISSION OF VIRGINIA

In the Matter of RAILWAY EXPRESS AGENCY, INCORPORATED

APPLICATION FOR CERTIFICATE TO DO BUSINESS IN VIRGINIA

The applicant submits the following grounds to the Commission showing that a refusal to permit the Railway Express Agency, Incorporated, to qualify in Virginia as a foreign corporation would be, in substance and effect, to require it to organize a domestic Virginia corporation to carry on its interstate business and, therefore, would be an attempted regulating of and burden on interstate commerce in violation of the commerce clause of the Federal Constitution, and requests the Cort to file said statement in writing as a part of the record in this case.

To refuse the Railway Express Agency, Incorporated, the certificate of authority to transact business in the State of Virginia under Section 3847 of the Virginia Code of 1919 as amended and under Chapter 158 of said Code, Sections 4027 to 4034, inclusive, and in accordance with Section 163 of the Virginia Constitution, on the ground that the Railway Express Agency, as incidental to its main business of carrying goods between the several states, would also do some local business by carrying goods from one point to another within the State of Virginia, would be violative of Article I, Section 8, paragraph 3, of the Constitution of the United States "To regulate commerce with foreign nations and among the several states."

1. The Railway Express Agency is simply an agency of the railroads themselves to conduct their own express business over their own lines or routes. Each of the railroads in Virginia employing this instrumntality, Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, Baltimore & Ohio Railroad Company, the Chesapeake & Ohio Railway Company, the Norfolk & Western Railway Company, the Richmond, Fredericksburg & Potomac Rail-

road Company, the Clinchfield Railroad Company, the Norfolk-Southern Railroad Company, the Virginian Railway Company and the Pennsylvania Railroad Company is a railroad whose line or route extends across the boundary of this Commonwealth.

[fol. 112] 2. The plan, as adopted, has as its objective to provide for the future conduct of the express business through a separate agency, which in effect is a joint facility of the railroads controlled by them through stock ownership.

3. The subscription, purchase or other acquisition of the Express Agency's shares of stock is to be limited to railroad corporations. No transfer or sale of any of said shares can be had without first offering such shares to the agency for purchase at the price at which the shares were issued.

4. The Agency acquires the property and equipment of the American Railway Express Company and assumes all of its liabilities.

5. Under the agreement of July 2, 1928, each railroad will appoint the Railway Express Agency as its exclusive agent for conducting and transacting all the express transportation business on its lines.

6. Certain short line railroads—constituting not over two per cent of the lines of the whole country—are to share in any benefits to be derived from the conduct of the express business by a railroad controlled agency upon the same terms and conditions as the participating railroads.

7. No dividends are to be declared on the 1,000 shares of non-par stock, but the net revenues will be paid over to the participating railroads upon the basis of gross revenues for each company in proportion to the total gross revenue earned. The earnings remaining after accounting for all items of income and deductions therefrom will be designated "rail transportation revenue" and paid to the carriers within specified groups that are entitled to receive it.

8. The eighty-six railroads constituting the owners of the lines creating the Railway Express Agency as their in-

strumentality for carrying their express transportation business over all their lines do nearly ninety-eight per cent of the gross express business of the whole country. All of them have approved the Plan for Future Conduct of Express Business. As showing conclusively that the railroads will themselves conduct the express business, we call the Commissioner's special attention to the opening paragraph of the agreement between each of these eighty-six railroads and the Railway Express Agency, Incorporated, [fol. 113] and which paragraph will be found in Exhibit D filed with the Report and Plan for Future Conduct of Express Business, at page 57 and which is as follows:

"Whereas, the Rail Company has united with other carriers operating railroads in the continental United States to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business; and

"Whereas, the Express Company has been organized as the joint express agency or facility of the Rail Company and other carriers uniting as aforesaid, all of which have undertaken to enter into agreements with the Express Company identical herewith;"

All of the eighty-six participating railroads have signed the operating agreement.

10. The foregoing are the facts found by the Interstate Commerce Commission and approved by its order of February 11th, 1929, and filed with this application of the Railway Express Agency, Incorporated, for a certificate to do business in the State of Virginia.

11. The foregoing further shows, we respectfully submit, that the Railway Express Agency is a mere agent of the railroads to conduct their own express transportation business. Those of them whose roads are located in the State of Virginia have lines or routes that extend across the boundaries of this State and all this express transportation business will be conducted by them through this instrumentality or agent. To deny the right of this agent—Railway Express Agency, Incorporated,—to conduct this

business would, we claim, be violative of the provision of the United States Constitution above quoted and which is now pleaded.

Only two attempts have been made to question this position.

1. It is said that this Railway Express Agency though a mere agent of the railroads' to conduct their own express business over lines that cross the boundary of this state, is in form a corporation. This, we submit, is at most a purely technical view. The courts have always refused to be trammelled by the logic derived from corporate existence [fol. 114] where it would only serve to distort or hide the truth. This agency is merely a practical instrumentality with the capacity of existing and acting as one body but, in fact and truth, is an association of the railroads to conduct the express business of all or nearly all the railroads covering the whole country. The Commission is asked to disregard the fiction of a corporate entity and recognize that the agency is controlled by the railroads themselves by exclusive stock ownership for the purpose of conducting their own express business over their own lines. These being the facts as disclosed by this record, to hold that this agency of these interstate carriers must be incorporated in this State before doing business therein because a small part—1⅔ per cent only—of its business is intrastate, would be to impose a burden upon interstate commerce that would be unconstitutional and violative of Article I, Section 8, paragraph 3 of the Constitution of the United States.

2. It is further said that this Agency will carry a certain amount of intrastate business, and that unless it is incorporated under the laws of Virginia it cannot do this. To this we reply:

(1) According to the report of the American Railway Express Company, whose business is now to be carried on by the Railway Express Agency, made to this Commission for the year ending December 31st, 1927, it is shown that the amount of business done by the American Railway Express Company during that year is divided between its intrastate business and its interstate business as follows:

Intrastate	$641,949.86
Interstate apportioned to Va.	$4,682,999.25
Total	$5,324,949.11

In other words, the interstate business is eighty-eight per cent (88%) and the intrastate business only twelve per cent (12%) of the total amount of express transportation business done in the State of Virginia for that year.

(2) This shows that the intrastate business to be done by the applicant is incidental to the interstate business and inseparable from it, and that any attempt to force a segregation of the interstate and intrastate business would be sub- [fol. 115] stantially a burden upon the interstate commerce which the Railway Express Agency is intended to conduct.

(3) These railroads as carriers of interstate freight, have the right also to carry intrastate freight without being required to incorporate under the laws of the State of Virginia. There is for the purposes of interstate commerce no difference between the right to carry freight and the right to carry express matter. But to separate the interstate express transportation from the intrastate express transportation would impose a greater burden upon these common carriers. In the express transportation of interstate and intrastate matter, they are inextricably intermingled. Besides, the pick up and delivery service requires that such express matter should be taken from the place of business or house of the consignor and delivered to the place of business or house of the consignee. To separate this express business would, therefore, necessitate trucks, wagons and employees doing a strictly intrastate business from the trucks, wagons and employees doing an interstate business. This could not be maintained without imposing requirements with respect to the interstate express business of these railroads that would impose upon it an unconstitutional burden, and to fetter by conditions their right to carry on interstate business. Such requirements would be unreasonable and pass beyond the bounds of suitable local protection.

The interblending of the interstate and intrastate express operations of these interstate carriers make the require-

ment that the intrastate express business can be done only by a corporation incorporated under the laws of the State of Virginia unreasonable and would impose requirements which would substantially affect its interstate express business. It would thus compel the railroads at prohibitive expense and inconvenience to separate the local from the interstate business. As we have seen, the interstate business is eighty-eight per cent of the total express business transacted by these common carriers, and it would be impracticable to effect such a separation.

(4) As was held by the Supreme Court of the United States in the case of Crutcher vs. Kentucky, 141 U. S., p. 47, 35 L. Ed., at page 653: 'We do not think that the difficulty is at all obviated by the fact that the express company as incidental to its main business (which is to carry goods between different states) does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for [fol. 116] the accommodation of the people of that state as for the advantage of the company. It does not obviate the objection of imposing conditions on the company's separating its intrastate business from its interstate business. Such regulations are clearly a burden and a restriction upon that commerce—whether intended as such or not, they operate as such.'

(5) It is doubtless for these and other reasons that the Legislature of Virginia has separated express companies from other common carriers, and although such companies may, as incidental to their interstate business, carry a small proportion of intrastate express matter, it is provided by Chapter 158 that such foreign express company shall be granted a certificate of authorization to do business in the State of Virginia, both interstate and intrastate upon conformity to the requirements of Section 3847 and Section 4027 of the Virginia Code of 1919. This has been the practical construction of the law by this Honorable Commission. Other foreign corporations have been granted the certificate to do express business in this State which the Railway Express Agency Incorporated, is now asking for. The two outstanding cases are those of the American Railway Express Company in 1918 and the Southwestern Express

Company in 1921. This rule of interpretation adopted by this Commission in the past is the rule of which we ask a practical construction in granting the certificate to carry on express business in this State to the applicant. Such construction in the past, we submit, is conclusive of the right of the Railway Express Agency, Incorporated, to be granted a similar certificate of authority. The reasons for granting this certificate to do an express business in this State are stronger than in the two cases above mentioned. In both of those cases the right to do an express business in this State was granted to a separate and distinct corporation controlled by outsiders, whilst in the instant case the right to carry on an express business in this State through this agency is only the granting of the right to the principals of said agency, the railroads, to conduct their own business under an agency or instrumentality owned by the railroads themselves and whose express matter is to be carried over their own roads or routes extending across the boundary of the State of Virginia.

Railway Express Agency,
By Counsel. Wyndham R. Meredith, Counsel.

[fol. 117] Copy of oral evidence in the matter of the application of the Railway Express Agency to do business in Virginia.

BEFORE STATE CORPORATION COMMISSION OF VIRGINIA

In the Matter of RAILWAY EXPRESS AGENCY, INCORPORATED

Application for Certificate to do Business in Virginia

Statement of Evidence

Present: Commissioners Epes and Fletcher.

Appearances: Wyndham R. Meredith, Esq., for the petitioner.

March 4th, 1929.

OFFERS IN EVIDENCE

Mr. Meredith: If Your Honors please, I desire to present the application for a certificate to do business in the

State of Virginia on behalf of the Railway Express Agency, Incorporated. I have submitted the papers to the clerk and I think the Commission possibly have also seen them and they are in proper order, so I won't detain you on that. I have here my own individual checks which are not certified by the bank, but the clerk does not think that is necessary at this stage.

As you are familiar with the articles of incorporation I will not detain the court by reading them, except I would like to be allowed to read the fourth section of the articles of incorporation. I have the certified copies here and I sent Your Honor, Mr. Epes, a copy.

The fourth section is as follows:

"The total number of shares of capital stock authorized is one thousand, which shares are without nominal or par value. Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof. The holder of any share or shares of stock of the corporation shall not sell, transfer or otherwise dispose of the same (other than [fol. 118] to a successor corporation by consolidation, merger or purchase), without first offering such share or shares to the corporation for purchase at the price at which such shares were issues.

The subscription, purchase or other acquisition and the holding and ownership of shares of stock of this corporation shall, as far as may be lawful, be limited to railroad corporations."

So I am calling attention to that only for the moment that this agency is a mere instrumentality of the railroads to carry on their own express business over their own lines.

Now having presented the necessary papers and certificate of incorporation, I also desire to offer in evidence a certified copy of the Report and Plan for Future Conduct of Express Business on which this company was incorporated. I will bring out the necessity for that later on.

I also desire to present in evidence from Mr. R. E. Steele, Assistant Assessor of the Commission, a brief statement as to the gross receipts of the American Railway Express Company.

The charter and the plan shows that we are simply acquiring all the property and equipment of the American Railway Express Company and are going to operate for profit over the lines now operated by that company, some eighty-six lines, and we take over the property and equipment and continue the operation over exactly the same lines as now operated by the American Railway Express Company.

The part of the statement which I have gotten Mr. Steele to certify to is as follows:

"All receipts from business beginning and ending within the State	$641,949.86
All receipts earned in Virginia on business passing through, into or out of this State	4,682,999.25
Gross receipts—Virginia	5,324,949.11"

This is for the entire line from the business of the company for the year ending December 31st, 1927, the last available figures.

Now I simply call attention to and ask that that be made a part of the evidence in the case for the present.

From the records of the Commission itself, Foreign License No. 1591 of the American Railway Express Company, I desire to offer certificed copy from the files of the [fol. 119] Commission of the certificate of incorporation of the American Railway Express Company. I also ask that that be received in evidence. I might add here while I think of it that I also desire to offer in evidence the order of the Commission allowing this American Railway Express Company to do business in the State. It is the formal order and contained in your big order book and I didn't think it necessary to bring it here. It is nothing in it that I want except the original order. I think it is in July, 1918, and is signed by my dear old friend Chris Garnett as chairman of the Commission.

I also desire to offer from the files of the Commission from Foreign Licens- No. 1997, permitting the Southeastern Express Company to do busines in this State, the following papers: I desire to offer in evidence the certificate of incorporat*ed* of October 6th, 1920, and the amendment of January 24th, 1921, of the Southeastern Express Company, incorporated under the laws of Alabama.

I also ask permission to offer in evidence the agreement between the Southern Railway Company and the Southeastern Express Company, effective May 1st, 1921, also from the files of the Commission and which has this letter, dated May 11th, 1921:

"Mr. R. T. Wilson, Clerk.

DEAR SIR: In accordance with the understanding had with the Commission at the time of the issuance to the Southeastern Express Company of a license to do business in this State, we beg to hand you herewith two certified copies of the agreement between the Southern Railway and the Southeastern Express Company for filing in your office along with the other documents relating to the domestication of this company in this States as a foreign corporation.

Yours very truly, Munford, Hunton, Williams & Anderson, Assistant Division Counsel."

Now you will notice that this was in accordance with the understanding with the Commission at the time.

I also ask leave to offer in evidence and I offer a certified copy made by the clerk of the Commission from the file of the Southeastern Express Company the following opinion [fol. 120] admitting the express company to do business in this State as a foreign corporation. I won't read the whole of this opinion, but I respectfully call the attention of the Commission to it and I am sure if you have not already read it you will be glad to do so, and I will read this concluding part:

"The Commission adopted the construction contended for by counsel for the express company and hence decided:

"1. A foreign public service corporation engaged in interstate commerce may be licensed to transact business in this Commonwealth under the provisions of Sec. 3845 and 3847 of the Code in spite of the provisions of Sec. 163 of the Constitution."

That is a direct decision on the point that seems to be facing us now. I, therefore, offer the opinion in this matter of the Southeastern Express Company as part of the evidence in this case.

I also offer in evidence the order granting permission to the Southeastern Express Company to do business in this State. I haven't it with me, but that will be understood the same as in the other case.

I also offer as of probative force in evidence the decision of the Interstate Commerce Commission rendered on February 11th, 1929, regarding the facts of the Railway Express Agency, Incorporated, as to its being practically a mere instrumentality and joint facility of these eighty-six roads and the other facts found by the Commission which I won't take time to read now. I may comment on them a little later and I think it is proper to offer them as probative because that is the only body that has the right to pass on these questions and there they point out what I have already said, that this is a mere instrumentality of the railroads to conduct their own express business over their own lines, the practical way of doing it, and I offer it for its probative effect and also because it is a very recent decision and unless you should have a photostatic copy, as I have, you will find some difficulty in getting it. I offer it now as probative proof.

Norman Call, a witness introduced in behalf of the petitioner, being first duly sworn, testified as follows:

[fol. 121] Direct examination.

By Mr. Meredith:

Q. Will you state your name, age and occupation?

A. Norman Call; 49 years old; Vice-President, Richmond, Fredericksburg & Potomac Railroad Company.

Q. How long have you been in the express business?

A. Since March 1st; in the railroad business since November 1st, 1901.

Q. Now the application made here of this Railway Express Agency, Incorporated, was really made on behalf of some eighty-six railroads and I find among those roads having routes in the State of Virginia the following: The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Louisville & Nashville Railroad Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, The Chesapeake & Ohio Rail-

way Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Norfolk Southern Railroad Company, The Virginian Railway Company, and Clinchfield Railroad Company. Have all of those railroads lines or routes extending across the boundary of the State of Virginia?

A. Yes, sir.

By Commissioner Epes:

Q. Are you sure about The Pennsylvania?

A. Yes, sir.

Q. Which one?

A. That is the old N. Y., P. & N., the capital stock of which is owned by The Pennsylvania and which is operated under a 999 year lease. Then The Pennsylvania also operates as a part of the Cumberland Valley, the old Cumberland Valley & Martinsburg which runs from Martinsburg down to Winchester.

Q. The Commission understands The Pennsylvania contends it does not operate in Virginia. I just want to know whether you are positive about that fact because it may become material in some other matters.

A. Here is the statement from Moody's Statement of Statistics which are submitted to railroads and receive their approval before publishing.

By Mr. Meredith:

Q. You say those railroads which I have enumerated now have lines or routes extending across the boundaries of the State of Virginia?

[fol. 122] A. Yes, sir.

Q. Each and every one of them?

A. Each and every one. That is, either physical lines or lines operated under trackage rights.

Q. Now coming down more specifically: the Virginia constitution was adopted in 1902. Have you any report from the Commission itself as to these roads at the time after the Constitution was adopted in 1903?

A. I have here a copy of the record of the State Corporation Commission of Virginia for 1903.

Q. Now will you state whether or not The Pennsylvania Railroad in 1902 had lines or routes crossing the boundaries of the State of Virginia which they operated?

A. The New York, Philadelphia & Norfolk Railroad, which was organized under the laws of Virginia, was at that time operating across the boundary of Virginia, and also the Cumberland Valley & Martinsburg Railroad Comp-ny.

Q. What was that a corporation of?

A. That was a corporation under a charter granted by the General Assembly of Virginia by an act approved July 9th, 1870.

Q. Those lines, you say, are operated by The Pennsylvania Railroad and were in 1902?

A. Yes, sir.

Q. They both cross the boundary of the State?

A. Both cross the boundary of the State.

By Commissioner Epes:

Q. Are you positive The Pennsylvania had leased them as early as 1902?

A. I wouldn't say that The Pennsylvania Railroad actually operated the New York, Philadelphia & Norfolk in 1902, though it owned its stock in 1902. As to the Cumberland Valley & Martinsburg Railroad Company, the report of the Commission, page 161, states: "This company is now being operated by the Cumberland Valley Railroad Company, one of the controlled lines of the Pennsylvania railroad, through its ownership of about 68 per cent. of the capital stock, but is operated by its own organization."

Commissioner Epes: That is the information of the Commission, that The Pennsylvania Railroad Company at that time did not claim to be operating anything in the State of Virginia; that while they owned stock in these companies, they were independently operated systems. I may be mistaken, but that is my understanding.

[fol. 123] By Mr. Meredith:

Q. At that time they were operating the cars of The Pennsylvania over those lines, were they not?

A. Trains operated in through services, yes.

Q. When did The Pennsylvania Railroad lease or otherwise acquire the N. Y., P. & N.?

A. On January 1st, 1918, the leases of railroad property held by the Pennsylvania Company were re-assigned to The Pennsylvania Railroad Company and on March 26th, 1921, the stockholders approved the long term lease of the railroad property and franchises of the following companies which are now operated directly by The Pennsylvania Railroad Company, namely: Cumberland Valley & Martinsburg Railroad and New York, Philadelphia & Norfolk Railroad, according to the statement in Moody's Manual.

Q. Is that all you want to say about The Pennsylvania?

A. As far as I am concerned.

Q. How about The Baltimore & Ohio Railroad Company?

A. The Baltimore & Ohio Railroad Company operates what was formerly known as Winchester & Potomac Railroad Company. That road was organized under the laws of Virginia on April 8th, 1831; chartered by an act of the General Assembly of Virginia, approved April 8th, 1831. It was leased to the Baltimore & Ohio Railroad for twenty years from July 1st, 1867 (renewable forever), and by it operated as a part of the Valley line. According to Moody's Manual, The Baltimore & Ohio was——

Q. What was the State Corporation Commission's Annual Report for 1903, page 815. Now from Moody's Manual it appears that The Baltimore & Ohio Railroad Company was re-organized without foreclosure in 1899, after which various other properties were merged, including among others The Valley Railroad of Virginia, of which the Winchester & Potomac was a part.

Q. That was merged when?

A. Immediately after the re-organization in 1899.

Q. Was there any other Virginia railroad that The Baltimore & Ohio operated?

A. There was another line which was not an interstate line, namely: Winchester & Strasburg Railroad Company, which was chartered by an act of the General Assembly of Virginia, approved April 23rd, 1867; road opened in 1870; operated by the Baltimore & Ohio Railroad Company, (page 837).

Commissioner Epes: The Commission does not under-
[fol. 124] stand that the tracks of the Valley Railroad cross the line anywhere. Our understanding is that the Valley Railroad of Virginia extends from Harrisonburg to Lexington and that there was at one time—the Baltimore & Ohio did have a lease of the road from Harrisonburg to Strasburg and that lease has long since expired and that has ceased as far as that is concerned in the State.

The Witness: It was the Winchester & Potomac which was the successor line.

Commissioner Epes: We don't understand the Winchester & Potomac and the Valley have any connection, except that some form of lease or control was operated over both of these by The Baltimore & Ohio.

The Witness: The report of the Commission of 1903, page 815, states the Winchester & Potomac was leased to The Baltimore & Ohio and operated by it as a part of the Valley line.

Commissioner Epes: What you are reading from is not a report of the Commission, but a report by the Commission of the reports of the railroad companies. The Commission understands what they called their Valley line at that time was made up of what is now part of the Southern and Valley Railroad of Virginia and Winchester & Potomac, but the situation has been changed since by the fact that their leasing operation of the line from Harrisonburg to Strasburg has lapsed and there is now no physical connection between them on their own tracks or by trackage rights.

The Witness: These three roads, according to this report of 1903, were operated by The Baltimore & Ohio Railroad Company, namely: the Winchester & Potomac, which is the interstate railroad line; the Winchester & Strasburg, which is intrastate; and the Valley Railroad of Virginia, which was intrastate at that time. All three of those were operated by The Baltimore & Ohio.

By Mr. Meredith:

Q. As one continuous line?

A. I wouldn't say it was one continuous line. There was that portion from Harrisonburg to Strasburg which I

think was operated by the Southern Railway. Whether the Baltimore & Ohio had trackage rights over that I can't say.

Commissioner Epes: The Baltimore & Ohio also made individual operating reports for these three roads to the State Corporation Commission of Virginia.

[fol. 125] Q. What was it that Moody said about the merger?

A. Moody said The Baltimore & Ohio Railroad was reorganized without foreclosure in 1869, after which various other properties were merged, including among others the Valley Railroad of Virginia.

Commissioner Epes: There apparently is nothing here in this Commission, so far as I have been able to ascertain, which shows any merger of the Valley Railroad and The Baltimore & Ohio and they are proceeding as a separate and distinct corporate entity before the Commission and with the knowledge of the Baltimore & Ohio Railroad, asking individual treatment by the Commission because it is isolated.

The Witness: Certainly the B. & O. officials are in better position to testify along that line than I am. I am relying on these reports. The proof of the Moody Manual is always submitted to the officials of the roads for correction and return before it goes to press.

By Mr. Meredith:

Q. How about the Winchester & Potomac; where does that run from?

A. The Winchester & Potomac runs from Harper's Ferry, West Virginia, to Winchester, Virginia.

Q. They do an interstate business?

A. They are an interstate railroad.

Q. It crosses the line?

A. Between West Virginia and Virginia.

Q. Now, Mr. Call, as to the Louisville & Nashville Railroad?

Commissioner Epes: The Commission thinks there is no question but the Louisville & Nashville was a railroad operated across the line in 1902.

Mr. Meredith: We will pass that by.

Q. Was the Seaboard Air Line Railway operating its line or route across the boundary of Virginia in 1902?

A. Yes, sir. The Seaboard Air Line Railway was organized August 5th, 1897, as Richmond, Petersburg and Carolina Railroad, according to the report of the Corporation Commission of 1903, page 579. The Seaboard Air Line was organized under the laws of the State of Virginia February 23rd, 1882, as Virginia and Carolina Railroad; Seaboard Air Line Railway, legal successor to Virginia and Carolina Railroad, act of Virginia January 12th, 1900. [fol. 126] Then follows a long list of the various component lines making up the Seaboard Air Line Railway, with this note: "All of the above named roads (except Seaboard and Roanoke and Georgia and Alabama Terminal Company which are controlled by stock ownership and by lease) have been consolidated or merged under and by virtue of their respective charters and the general laws of the States in which they severally operate, save in the States of Virginia and North Carolina, where such consolidation was authorized by special acts of the General Assembly of those States—in Virginia by act January 12th, 1900, and in North Carolina by act February 27th, 1901."

Q. So the Seaboard Air Line Railway in 1902 was operating its lines across the boundary of Virginia?

A. Yes, sir; for North Carolina.

Q. The next one is the Atlantic Coast Line.

A. The Atlantic Coast Line Railroad Company was organized under an act of the General Assembly of Virginia approved March 12th, 1900. That was a consolidation of a number of lines comprising what is now the Atlantic Coast Line Railroad Company. Prior to that time there were a number of disconnected but closely connected systems.

Q. So the Atlantic Coast Line Railroad Company was operating lines on routes across the boundary of Virginia in 1902?

A. Yes, sir.

Q. Now the Chesapeake & Ohio Railway Company.

A. The Chesapeake & Ohio Railway Company, the present company, was incorporated under the laws of Virginia and West Virginia on July 1st, 1878, a successor of the old Chesapeake & Ohio Railroad, and in 1903 it was operating

across the boundary between the States of Virginia and West Virginia.

By Commissioner Epes:

Q. Is that the Chesapeake & Ohio Railway or Railroad Company?

A. Chesapeake & Ohio Railway Company organized July 1st, 1878, as successor to the Chesapeake & Ohio Railroad.

By Mr. Meredith:

Q. That company was also operating its line or route across the boundary of the State of Virginia in 1902?

A. Yes, sir; that was operating across the line between Virginia and West Virginia just west of Allegheny Station, [fol. 127] and then on trackage rights between Virginia and the District of Columbia.

Q. Now the Norfolk & Western Railway.

A. The Norfolk & Western was organized under an act of the General Assembly of Virginia approved January 15th, 1896.

By Commissioner Epes:

Q. Railway or Railroad?

A. Norfolk & Western Railway Company. No, I beg pardon. In 1896 it was organized under an act of the General Assembly of Virginia, approved January 15th, 1896, entitled "an act authorizing the purchasers of the railroads and property of the Norfolk and Western Railroad Company, sold by foreclosure of a deed of trust or mortgage thereon, to became and be a corporation, to adopt a name therefor, and to possess and exercise general and other powers". So it was the Norfolk & Western Railroad Company at that time.

Q. What time was that?

A. September 4th, 1896.

Q. What are you reading from?

A. Report of the State Corporation Commission of 1903, page 432.

Q. So that railroad was also operating lines and routes across the boundary of the state in 1902?

A. Yes, sir.

Q. Was the Norfolk & Western first incorporated in Virginia or West Virginia?

A. In Virginia.

Q. Now as to the Richmond, Fredericksburg & Potomac Railroad Company.

A. In 1903 the Washington Southern Railroad was operating between Quantico and Washington. In February, 1920, the R. F. & P. acquired all of the property of the Washington Southern and merged its property and its corporation into the Richmond, Fredericksburg & Potomac Railroad Company.

Q. Which one of those roads is operating across the boundary?

A. The old Washington Southern in 1903 was operating across the boundary from the south end of Long Bridge north under trackage rights granted by the Pennsylvania Railroad.

Q. But you were running your trains across?

A. The trains were physically operated from Richmond to Washington.

[fol. 128] By Commissioner Epes:

Q. Were they operated over that road as trackage rights or did they become Washington Southern trains when they got on their right of way?

A. They were Washington Southern trains from Washington to Quantico in 1903 and Richmond, Fredericksburg & Potomac trains from Quantico to Richmond.

By Mr. Meredith:

Q. But it was a continuous service from Richmond to Washington in 1902?

A. Yes, sir. As a matter of fact, at that date going from Byrd Street Station in Richmond to Washington you crossed the rails of seven separate corporations.

Q. Now about the Norfolk & Southern Railroad Company?

A. The Norfolk & Southern Railroad Company was organized June 1st, 1891, according to the report of the Commission, page 404.

By Commissioner Epes:

Q. Is that Norfolk & Southern?

A. Norfolk & Southern Railroad Company at that time.

Q. That isn't the name of this road?

A. No, sir; Norfolk Southern.

By Mr. Meredith:

Q. The Norfolk Southern has succeeded the Norfolk & Southern?

A. Yes, sir. The Norfolk Southern, eliminating the "and" from the name, was incorporated April 30th, 1910, as successor on the re-organization of the Norfolk & Southern Railway Company.

Q. Now the Norfolk & Southern Railroad Company in 1902 was operating its route or line across the State of Virginia?

A. The Norfolk & Southern Railroad was operating in 1902 across the border line between Virginia and North Carolina.

Q. And the Norfolk Southern is the mere successor of that company?

A. Yes, sir.

Q. Now the Virginian Railway was incorporated in 1904, wasn't it?

A. Incorporated February 20th, 1904, as the Tidewater Railway Company, named changed to the Virginian Railway on March 8th, 1907.

[fol. 129] Q. Now the Clinchfield Railroad Company.

A. That was incorporated under the laws of Virginia as the South and Western on January 26th, 1905; changed to the Carolina, Clinchfield & Ohio Railway on March 7th, 1908.

Q. What part of that line was in Virginia and under what corporate name, if any?

A. The Virginia line was built under the name of the South & Western.

Q. When was that incorporated?

A. That was incorporated on January 26th, 1905.

Q. Now returning to The Pennsylvania Railroad, you say that it is now operating across the boundary of Virginia at two points; one is the New York, Philadelphia & Norfolk Railroad?

A. Yes, sir.

Q. Was that railroad operating across the State of Virginia boundary in 1902?

A. The N. Y., P. & N., yes, sir.

Q. Whether it was owned at that time by The Pennsylvania Railroad or not, the railroad itself was in operation and operated across the State?

A. The railroad was operating physically at that time as an interstate railroad.

Q. How about that line of the Pennsylvania that it seems to own and operate now and in 1902. What line was that?

A. Part of the Cumberland Valley branch running down from Martinsburg, West Virginia, to Winchester, Virginia.

Q. So in 1902 that line was crossing the State of Virginia?

A. Yes, sir.

Q. Whether it was owned by the Pennsylvania or not?

A. Yes, sir.

Q. So all these roads then were operating across the boundary of the State in 1902, except the Virginian Railway and the Clinchfield Railroad?

A. Yes, sir.

Witness stood aside.

W. K. Weaver, a witness introduced in behalf of the petitioner, being first duly sworn, testified as follows:

[fol. 130] Direct examination.

By Mr. Meredith:

Q. State you name, age and occupation.

A. William K. Weaver; Superintendent, Railway Express Agency, Inc.

Q. How long have you been employed in the express business?

A. 26 years.

Q. How long have you been employed as superintendent of the express business in the City of Richmond?

A. Since July 1st, 1918.

Q. Of what company were you superintendent?

A. American Railway Express Company.

Q. What lines did that company operate?

A. That company operated all of the lines in the United States with the exception of the Southern Railway System.

Q. Then the lines which are applying for this certificate of incorporation are the same railroads that operated the American Railway Express Company in 1918?

A. Yes, sir.

Q. And are now at this time?

A. Yes, sir.

By Commissioner Epes:

Q. Do I understand these railroads own the American Railway Express Company?

A. No, sir.

By Mr. Meredith:

Q. The American Railway Express Company was entirely a distinct corporation, wasn't it?

A. Yes, sir.

Q. And was not owned by the railroads at all?

A. No, sir.

Q. In fact, it was the successor to some five or six old express companies—the Wells Fargo, the Adams, the American Express Company, the Southern, etc.?

A. Yes, sir.

Q. And they took the stock of the American Railway Express Company and own it?

A. Yes, sir.

Q. And the railroads had no interest, either stock or otherwise?

A. No, sir.

Q. Now it is suggested that this company could do an interstate business—this Railway Express Agency—but if it [fol. 131] wishes to do an intrastate business it is suggested it might be legal or proper for it to get a Virginia charter. Will you state whether the American Railway Express Company does an intrastate as well as an interstate business?

A. Yes, sir.

Q. And has been doing it all the time?

A. Yes, sir.

Q. Has it ever been required to get a Virginia charter?

A. I understand it has not.

Q. It is operating under its Delaware charter, isn't it?

A. Yes, sir.

Q. It is incorporated in the State of Delaware and has been granted a certificate of authority to do business in the State of Virginia in 1918?

A. Yes, sir.

Q. Suppose the Railway Express Agency was required to take out a Virginia charter, will you state to the Commission what will be the effect upon its business and whether such a procedure is practicable?

A. It would be almost impossible to separate the intrastate business from the interstate business and that has been practically admitted in making our tax returns. We are taxed on interstate business as well as on intrastate business, and furthermore we could not. A part of the business that moved from one point in the State to another point in the State is interstate business because it passes out of the line of the State and then back into it and I don't see how we could possibly separate the interstate from the intrastate.

By Commissioner Epes:

Q. What is to prevent you from doing interstate and not doing intrastate?

Mr. Meredith: I suppose nothing but the accommodation of the public.

A. That is the only thing I would see. I don't see how you could set yourself up to do an interstate business in the transportation business and not do an intrastate business.

By Mr. Meredith:

Q. What would you have to have in the way of equipment if you had these two separate corporations?

A. We would have to have a separate company to do the intrastate business and cover the routes and cities with one

[fol. 132] set of trucks for interstate business and another set for the intrastate business.

Q. And you would have to acquire separate trucks and separate employees for each of the companies?

A. Yes, sir.

Q. Would you know if a man called you up and wanted a shipment made of perishable fruit—would you know whether it would be interstate or intrastate?

A. Not unless he told us and then, as I said before, going from one point in the State of Virginia it might still be interstate if it went outside of the State and came back in.

Q. So you think it would mean great confusion and would be impracticable to segregate the two?

A. Yes, sir.

By Commissioner Epes:

Q. Are there any such conditions, except as exist down on the Southern Railway?

A. Oh, yes; over on the Norfolk & Western the line goes back and forth between the States.

Q. Whereabouts?

A. Around Norton and Bluefield.

Q. You mean it passes through Bluefield?

A. Passes through the corner of the State.

Q. The railroads have always contended here that wasn't intrastate at all, that it was entirely interstate?

A. Yes, that is what I say. It would be interstate business although it moved from one point in the State of Virginia to another point.

By Mr. Meredith:

Q. It goes outside and comes back?

A. Yes, sir, and that is interstate business.

Q. Now it seems that two of these companies of the eighty-six applying for this certificate on behalf of the Railway Express Agency, one the Virginian and the other the Clinchfield Railroad, were incorporated at or before 1902; that the Virginian was incorporated in 1904 and the Clinchfied Railroad Company was incorporated in 1905. Aren't those largely coal roads?

A. Yes, sir.

Q. The majority of their business is largely *cold* shipments?

A. Yes, sir.

Q. And do a comparatively small amount of passenger and freight and express business?

[fol. 133] A. Yes, sir; just local business.

Q. Now can you state what would be the percentage of intrastate business that would be carried over the Virginian Railway Company if this certificate is granted, since you have already stated that this company is going to take over the American Railway Express Company?

A. Based on the figures of the American Railway Express Company for the year 1928, it would be less than two per cent. of the intrastate business in Virginia.

Q. Done by the Virginia Railway?

A. By the Virginian and the Clinchfield.

Q. The two together would carry less than two per cent.?

A. Of the intrastate business in Virginia.

Q. How much would it be of the total amount of interstate and intrastate?

A. It would be negligible; less than one per cent.

Witness stood aside.

Testimony concluded.

Certificate as to gross receipts of American Railway Express Company.

STATEMENT SHOWING THE GROSS RECEIPTS OF AMERICAN RAILWAY EXPRESS COMPANY FROM BUSINESS TRANSACTED IN VIRGINIA DURING THE YEAR ENDING DECEMBER 21ST, 1927, AS RETURNED TO THE STATE CORPORATION COMMISSION OF VIRGINIA FOR TAXATION FOR THE YEAR 1928

All receipts from business beginning and ending within the State	$641,949.86
All receipts earned in Virginia on business passing through, into or out of this State	4,682,999.25
Gross receipts—Virginia	5,324,949.11
Gross receipts—entire line, from the business of this company for the year ending December 31st, 1927	285,063,377.03

[fol. 134] I hereby certify that the above is a true copy of the return for taxation made by the American Railway Express Company of its gross receipts from business transacted in Virginia during the year ending December 31st, 1927.

R. E. Steele, Assistant Assessor.

Articles of incorporation of the American Railway Express Company.

ARTICLES OF INCORPORATION OF THE AMERICAN RAILWAY EXPRESS COMPANY

First. The name of this Corporation shall be the American Railway Express Company.

Second. Its principal office or place of business in the State of Delaware shall be located in the city of Dover, County of Kent, and its resident agent shall be the United States Corporation Company, whose address is 311 South State Street, in said city.

Third. The nature of the business and the objects and purposes proposed to be transacted, promoted and carried on, are as follows:

To engage in and carry on in the State of Delaware, and in and between any and all of the States, Territories and possessions of the United States and the District of Columbia, and in adjacent foreign countries, the business of carrying and transporting and forwarding by railroads, steamboats, ships, canals, stages and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and movable valuables of any description, over and upon such lines and routes as it may, from time to time establish, and in and between the points, places or stations at which it may from time to time establish and continue agencies; and the said corporation is hereby invested with the powers necessary and proper for said purpose, as well as the powers incident and appropriate to express carriers, and especially with full power to give such security [fol. 135] in the nature of a general transportation bond as

may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bond, from port to port in the United States, or through the United States.

To take bonds of indemnity with or without security from its agents and employes, to acquire by purchase, devise or otherwise, and to hold real and personal estate of any value to the amount necessary and proper for the purpose for which it is incorporated, and to sell, mortgage or otherwise dispose of the same;

To borrow, when necessary for the purpose of its business, money, with or without pledge of or mortgage on all or any of its property, real or personal, as security;

To take, hold and dispose of any mortgage on real or personal estate; and to issue bonds, debentures or obligations of the corporation from time to time for any of the objects or purposes of the corporation;

To have one or more offices, to carry on any or all of its operations or business and without restriction or limits as to amount to purchase or otherwise acquire, to hold, own, to mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, territories, districts, colonies or possessions of the United States and in adjacent foreign countries, subject to the laws of such state, district, territory, colony, possession or country;

To enter into, make, perform, and carry out contracts of every kind for any lawful purpose without limit as to amount with any person, firm, association or corporation; and to act as agent for any person, firm, association or corporation for any lawful purpose; and to do a general collection business.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

In general, to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the laws of said State.

[fol. 136] To purchase, hold and reissue any of the shares of its capital stock.

Fourth. The total authorized capital stock of this corporation is Forty Million Dollars ($40,000,000), divided into Four Hundred Thousand (400,000) shares, of par value of One Hundred Dollars ($100.) each.

The amount of capital stock with which this corporation will commence business is Thirty-three Million Dollars ($33,000,000).

The names and places of residence of each of the subscribers to the capital stock are as follows:

Name	Residence
William M. Barrett	272 West 86th St., New York City, N. Y.
George C. Taylor	328 Cliff Ave., Pelham Heights, N. Y.
Burns D. Caldwell	81 High Street, Orange, N. J.

The existence of this corporation is to be perpetual.

The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

The Directors shall have power to make and to alter or amend the By-laws; to fix the amount to be reserved as working capital, and to authorize and cause to be executed, mortgages and liens without limit as to amount, upon the property and franchise of this Corporation.

The By-laws shall determine whether and to what extent the accounts and books of this corporation (other than the stock ledger), or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book, or document of this Corporation, except as conferred by law or the By-laws, or by resolution of the stockholders.

The stockholders and directors shall have power to hold their meetings, and keep the bonds, documents and papers of the corporation outside of the State of Delaware, at such places as may from time to time be designated by the By-laws or by resolution of the stockholders or directors.

The Directors shall have power, by a resolution passed by a majority vote of the whole Board, under suitable provi-

sion of the By-laws, to designate two or more of their number to constitute an Executive Committee, which committee [fol. 137] shall, for the time being, as provided in said resolution or in the By-laws, have and exercise any or all the powers of the Board of Directors which may be lawfully delegated in the management of the business and affairs of the Corporation and shall have power to authorize the seal of the said Corporation to be affixed to all papers which may require it.

The Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the statutes of the State of Delaware, and all rights conferred on officers, directors, stockholders herein are granted subject to this reservation.

We, the undersigned, for the purpose of forming a Corporation, under the laws of the State of Delaware, do make, file and record this Certificate, and do certify that the facts herein stated are true; and we have accordingly hereunto set our respective hands and seals.

Dated at New York June 20th, 1918.

William M. Barrett (Seal), George C. Taylor (Seal), Burns D. Caldwell (Seal).

In the presence of F. P. Small, T. B. Harrison.

State of New York,
County of New York, ss:

Be it remembered, that on this twentieth day of June, 1918, A. D., personally appeared before me, the subscriber, a Notary Public, for the State of New York, William M. Barrett, George C. Taylor, and Burns D. Caldwell, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate of Incorporation to be their act and deed, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

C. S. Cable, Notary Public. C. S. Cable, Notary [fol. 138] Public, New York County. New York County No. 306. New York County Register's No. 10245. C. S. Cable, Notary Public, New York County.

State of Delaware, Office of Secretary of State

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "American Railway Express Company", as received and filed in this office the twenty-second day of June, A. D. 1918, at 1 o'clock P. M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover, this twenty-fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

Charles H. Grantland, Secretary of State. (Seal.)

Certificate of Incorporation of Southeastern Express Company.

CERTIFICATE OF INCORPORATION OF SOUTHEASTERN EXPRESS COMPANY

To the Probate Judge of Jefferson County, Alabama, and to all to whom these presents may come:

Whereas, in order to afford such railway express service and facilities to the Southeastern Section of the United States as the public convenience and necessities of that Section require, the undersigned desire to form a corporation [fol. 139] for the purpose of owning and operating an express business in the Southeast and elsewhere; and

Whereas, the undersigned desire said Express Corporation to have all the rights, powers, and privileges and to be subject to all the duties and liabilities of such a corporation organized under the laws of Alabama and specially conferred herein;

Now, therefore, we, the undersigned and hereinafter named incorporators and subscribers to the capital stock of Southeastern Express Company, do declare and certify as follows, to-wit:

I

Name

The name and style of the proposed corporation is "Southeastern Express Company."

II

Objects

The object of this corporation is to secure to itself lawful authority and full power to do and perform by contract with railway and steamship companies and otherwise a general business in the State of Alabama and in any other State or Territory of the United States and in the District of Columbia, and between any States or Territories of the United States or the District of Columbia, and from any place in the United States to or from a foreign or adjacent country.

III

Location of its Principal Office in This State

The principal office of the said corporation in this State shall be at Birmingham, Jefferson County, Alabama.

[fol. 140]

IV

Capital Stock

Amount of total authorized capital stock of the Southeastern Express Company shall be two thousand dollars ($2000.00), divided into twenty shares of the par value of one hundred dollars ($100.00) each. The amount of capital stock with which it will begin business is two thousand dollars ($2000.00).

V

Name of Agent Designated to Receive Subscriptions to Its Capital Stock

The incorporators have designated Haddon Johnson of Washington, D. C., to receive subscriptions to the capital stock.

VI

Names, Post Office Addresses of Incorporators, and Number of Shares Subscribed for by Each

The names and post office addresses of the incorporators, and the number of shares subscribed for by each are:

Name	Post Office address	Number of shares subscribed for	Amount
Charles A. Lyerly	Chattanooga, Tenn.	4	$400.00
Robert F. Maddox	Atlanta, Georgia	4	400.00
George L. Baker	Columbia, S. C.	4	400.00
H. C. Armstrong	Selma, Alabama	4	400.00
D. P. Bestor, Jr.	Mobile, Alabama	4	400.00
Total		20 at $100	$2,000.00

VII

Time Limit

The period of time for the duration of said corporation is unlimited.

[fol. 141]

VIII

Regulation of Business

The business of the corporation shall be under the general management and control of a Board of Directors, consisting of five members, holding and owning in good faith, and in their own right, shares of the capital stock, who have been elected by the stockholders at their organization meeting, and thereafter to be elected at each regular annual meeting of the stockholders held within or without the State of Alabama as may be prescribed by the By-laws.

The Directors shall have power to make and alter or amend the By-laws.

The officers of the Southeastern Express Company shall be a President, one or more Vice-Presidents, a Secretary, and a Treasurer, and such other or different officers as may be prescribed by the By-laws, and such officers shall each exercise such powers and duties as may be delegated to him by the By-laws.

IX

First Board of Directors and Officers

The first Board of Directors shall consist of five members, who shall hold office until a new Board shall be elected by the stockholders of the Company at their first annual meeting after organization.

We have this day elected, and do hereby certify, that we have elected Charles A. Lyerly, Robert F. Maddox, George L. Baker, H. C. Armstrong, D. P. Bestor, Jr., as such first Board of Directors, and said Board has elected Charles A. Lyerly, President; Robert F. Maddox, Vice President; D. P. Bestor, Jr., Secretary; H. C. Armstrong, Treasurer, to the respective offices set opposite their names.

[fol. 142]

X

This corporation here organized shall not have the right, power, or authority to manufacture, sell, keep for sale, or otherwise dispose of or store, warehouse, deliver, or transport any prohibited liquors or beverages contrary to the laws of Alabama or the United States or any State or Territory in which such act may be performed. If it violates this provision of its charter, it will forfeit its charter in a suit in quo warranto, if any person or officer wishes to bring such suit, in a Court of competent jurisdiction of the State of Alabama.

XI

Special Provisions

The general powers vested in the Southeastern Express Company are the powers conferred upon such corporations under the laws and Constitution of the State of Alabama, and the Southeastern Express Company is empowered, among other things:

To do by land or by water an express business for the safe transportation an- d*d*elivery in their own conveyances or those of others of property of every kind, including goods, wares, merchandise, live stock, coin, bullion, bank notes, currency, and other articles of value, from, to, in, and between points on lines or routes or at agencies it may itself establish or to or from points to which it may in con-

junction with others maintain and establish through lines or routes or joint agencies, and to do and perform all auxiliary, accessorial, and incidental service necessary to complete the express service undertaken;

To acquire, hold, and dispose of by devise, purchase, sale, lease, or otherwise all equipment, including railway equipment, and all land and buildings and other property as may be required for the performance of its business;

To borrow money necessary for the proper conduct, expansion, or improvement of its business and issue evidences of indebtedness, notes, bonds, or debentures, and to mortgage any or all of its property, franchises, etc., to secure the payment thereof or to secure the performance of any undertaking on its part made in the carrying on of its business;

[fol. 143] To lend its money and to buy, hold, and sell mortgages, stocks, bonds, or other evidences of indebtedness;

To consolidate or merge its corporation and property with any other Express Corporation in accordance with the laws of Alabama and the United States, or other duly constituted authority;

To indemnify itself by insurance against fire and loss or damage of any and all kinds, including indemnity from its officers, agents, and employes;

To issue letters of credit and Express Money Orders; to collect money; to receive for collection notes, drafts or other choses in action and make return of the proceeds;

To contract with railway companies for the transportation of goods entrusted to the Express Company in cars of the Railway Company and for the transportation of cars of the Express Company containing goods entrusted to the Express Company, and to make any and all other lawful contracts;

To establish agencies at any and all points and in any country from which it may secure authority to do so;

To receive Power of Attorney from any person, corporation, or duly constituted authority; in the performance of its business to make and execute with or without surety any bond required by the laws of the United States or any State or Territory or the District of Columbia or any foreign country;

To adopt all reasonable rules and regulations for the conduct of its business.

XII

General Recitals

The attached sworn statement of Haddon Johnson, the person authorized by the incorporators to receive the subscriptions to the capital stock, shows the correct amount of the capital stock subscribed which has been paid in, and attached thereto is a copy of the subscription list.

[fol. 144] Said incorporators, hereunto set their hands and affix their seals and file this their Certificate in this Honorable Court and pray that such proceedings be had as will fully and legally organize said incorporators, their successors and assigns, a body corporate under the name set forth in this Certificate and for the purposes set forth herein.

(Signed) Chas. A. Lyerly (L. S.), (Signed) Robt. F. Maddox (L. S.), (Signed) Geo. L. Baker (L. S.), (Signed) H. C. Armstrong (L. S.), (Signed) D. P. Bestor, Jr. (L. S.).

Statement of Subscriptions to the Capital Stock

STATE OF ALABAMA,
Jefferson County:

Before me, the undersigned authority in and for said State and County, this day personally appeared Haddon Johnson, who, being by me first duly sworn, upon oath deposes and says:

That he is the person duly authorized by the incorporators of Southeastern Express Company to receive subscriptions to its capital stock; that in pursuance of said appointment he opened books of subscription to the stock of said Southeastern Express Company and that the capital stock of said corporation has been subscribed for as shown by the copy of the subscription list attached hereto and made a part hereof; and that each of the said subscribers shown on said subscription list has paid in to him in cash the amount of the capital stock subscribed for, as follows:

Name of subscriber	Number of shares	Amount of cash paid in
Charles A. Lyerly	4	$400.00
Robert F. Maddox	4	400.00
George L. Baker	4	400.00
H. C. Armstrong	4	400.00
D. P. Bestor, Jr.	4	400.00
	Total, 20	Total, $2,000.00

(Signed) Haddon Johnson.

[fol. 145] Sworn to and subscribed before me on this 6th day of October, 1920. (Signed) Helen B. Harrison, Notary Public, Jefferson County, Alabama. (Seal.)

Subscription List to the Capital Stock of the Southeastern Express Company

We, the undersigned, hereby subscribe for the number of shares of the capital stock of the Southeastern Express Company shown opposite our respective names, and herewith pay in our said subscriptions, respectively, in cash.

Said shares of stock are of the par value of One Hundred Dollars ($100.00) each

Name of subscriber	Number of shares	Amount paid in in cash	Date of subscription
(Signed) Chas. A. Lyerly	4	$400.00	10/2/20
(Signed) Robt. F. Maddox	4	400.00	10/2/20
(Signed) Geo. L. Baker	4	400.00	9/30/20
(Signed) H. C. Armstrong	4	400.00	10/4/20
(Signed) D. P. Bestor, Jr.	4	400.00	10/5/20

Filed in Office for Record October 6th, 1920, and duly recorded in Vol. 6 Record of Incorporations, on page 525, this 6th day of October, 1920.

J. P. Stiles, Judge of Probate.

State of Alabama,
Jefferson County:

Probate Court

I, J. P. Stiles, Judge of Probate in and for said County, in said State, hereby certify that the foregoing contains a

true, correct and complete transcript of the Certificate of Incorporation of Southeastern Express Company, together with the filing thereof, as recorded in Incorporation Record 6, page 525.

[fol. 146] Witness my hand and Official Seal, this 6th day of October, 1920.

(Signed) J. P. Stiles, Judge of Probate. (Seal.)

O. K. J. P. S.

REPORT OF INCREASE IN CAPITAL STOCK OF SOUTHEASTERN EXPRESS COMPANY

STATE OF ALABAMA,
Jefferson County:

Know all men by these presents, That the undersigned, J. B. Hockaday and Ferris W. Woods, President and Secretary, respectively, of Southeastern Express Company, being by me duly sworn, do on their oaths say:

"The following is a true and literal copy of a resolution introduced and the vote thereon had, as the same appears on the minutes of a special meeting of the Stockholders of Southeastern Express Company, held at Birmingham, Alabama, on January 24, 1921:

'The following resolution was offered:

'Whereas, the Board of Directors of this Company has called this special meeting of the Stockholders and given notice thereof, which notice set forth that the herein named matters would be acted upon and which notice was acknowledged by the Stockholders of all of the stock of Southeastern Express Company, waiving all, other, or further notice of this meeting; and

'Whereas, there has been submitted to this meeting the following resolution adopted by the Board of Directors of Southeastern Express Company at a meeting duly and legally held:

"Whereas, on October 6th, 1920, this Company was duly chartered as an express corporation in accordance with the general incorporation law of Alabama; and

[fol. 147] "Whereas, it is desirable to amend the charter of Southeastern Express Company in the particulars here-

inafter set forth and in accordance with Section 3462 of the Code of Alabama, 1907, as amended by an Act of the Legislature of Alabama, approved October 6, 1920, page 136, of the General and Local Acts, Alabama, Special Session, 1920, and in accordance with Sections 3466 and 3480, Code of Alabama, 1907.

"Resolved, That the capital stock of Southeastern Express Company be increased from Two Thousand ($2,000) Dollars divided into twenty (20) shares of the par value of One Hundred Dollars ($100) each, to One Million Dollars ($1,000,000) divided into ten thousand (10,000) shares of the par value of One Hundred Dollars ($100) each.

"Resolved, That the Board of Directors shall be increased from five (5) to seven (7) members.

"Resolved, That the general officers of the corporation, until the same be changed in accordance with the By-laws, be a President and General Manager, Vice-President, Secretary-Treasurer, General Counsel.

"Resolved, That the Secretary of this Company give notice of a special meeting of the Stockholders, stating therein the increase which is proposed to be made in the capital stock of th- corporation and stating therein the above set forth amendments to the charter to be acted on.

"Resolved, That if and when the action herein recommended is favorably voted upon by the larger amount in value of the Stockholders at a legally held meeting, the officers of this Company hereby are authorized and directed to execute all such papers and take all such steps as may be necessary to increase the capital stock of this Company and to make effective said other amendments of the Company's charter."

"Resolved, That the capital stock of Southeastern Express Company be and it is hereby increased from Two Thousand Dollars ($2,000) to One Million Dollars ($1,000,000).

[fol. 148] 'Resolved, That the charter of Southeastern Express Company be amended by increasing the number of Directors from five (5) to seven (7).

'Resolved, That the general officers of the Company, until changed in accordance with the By-laws, shall consist of a President and General Manager, Vice-President, Secretary-Treasurer, General Counsel.

'Resolved, That the President and Secretary under the Corporate Seal certify to the foregoing charter amendments and a report thereof and file the same in the office of the Judge of Probate of Jefferson County, Alabama.

'The foregoing resolution being duly seconded and a stock vote being called for and had, the Inspectors reported as follows:

"We, the Inspectors, appointed to act as such at the special meeting of the Stockholders of Southeastern Express Company held this 24th day of January, 1921, do certify that twenty (20) votes, being the vote of all of the stock of Southeastern Express Company, were voted in favor of the foregoing resolutions amending the charter of Southeastern Express Company as therein set forth.

(Signed) R. H. Scrivner, (Signed) C. J. O'Brien, Inspectors."

'Whereupon the Chairman declared the resolution unanimously adopted by vote of all of the stock of the Compan-.' "

(Signed) J. B. Hockaday, President Southeastern Express Company. (Signed) Ferris W. Woods, Secretary Southeastern Express Company.

Subscribed and sworn to before me this 24th day of January, 1921. (Signed) A. J. Robins, Notary Public, Jefferson County, Ala. (Notary's Seal.)

[fol. 149] Filed in office for record Jany. 24th, 1921, and duly recorded in Vol. 7, Record of Inc. on page 135, this 24th day of January, 1921.

J. P. Stiles, Judge of Probate.

STATE OF ALABAMA,
Jefferson County:

PROBATE COURT

I, J. P. Stiles, Judge of Probate, in and for said County and State, hereby certify that the foregoing is a true and complete copy of the charter of Southeastern Express Company as the same is filed and recorded in Incorporation Record 6, page 525, and is a true and complete copy of the

amendment to the charter of Southeastern Express Company, as the same is filed and recorded in Incorporation Record 7, page 135, together with the record of filing of the original charter and the amendment thereof in this office.

J. P. Stiles, Judge of Probate. (Seal.)

AGREEMENT OF THE SOUTHEASTERN EXPRESS COMPANY AND THE SOUTHERN RAILWAY SYSTEM

Dated March 1, 1923

Southeastern Express Company with Southern Railway Company, the Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, New Orleans and Northeastern Railroad Company, Georgia Southern and Florida Railway Company, Northern Alabama Railway Company, Atlantic and Yadkin Railway Company, Blue Ridge Railway Company, Carolina and Northwestern Railway Company, Danville and Western Railway Company, Hartwell Railway Com- [fol. 150] pany, High Point, Randleman, Asheboro and Southern Railroad Company, Tallulah Falls Railway Company, Yadkin Railroad Company, Mobile and Ohio Railroad Company

General Agreement for Express Facilities

An agreement, made this first day of February, 1928, by and between Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, New Orleans and Northeastern Railroad Company, Georgia Southern and Florida Railway Company, Northern Alabama Railway Company, Blue Ridge Railway Company, Carolina and Northwestern Railway Company, Danville and Western Railway Company, High Point, Randleman, Asheboro and Southern Railway Company, Yadkin Railroad Company, Mobile and Ohio Railroad Company, the Receivers of Atlantic and Yadkin Railway and the receiver of Tallulah Falls Railway, parties of the first part, and Southeastern Express Company, party of the second part, witnesseth:

That for good and sufficient considerations thereunto moving them, the parties hereto covenant and agree, each

unto and with the others, that the general agreement for express facilities made and entered into by and between Southern Railway Company and Southeastern Express Company, bearing date of the first day of March, 1923, and limited to expire on the 29th day of February, 1928, unless sooner termin-ted as therein provided, to which the other companies herein joined with Southern Railway Company became parties by subscribing the memorandum attached to and made a part of said agreement, shall, notwithstanding said limitation, continue of full force and effect and be binding upon [fol. 151] all parties hereto, unless sooner terminated, for and during the full term of five (5) years beginning on the first day of March, 1928, and ending on the 28th day of February, 1933, with like effect and to all intents and purposes as if the said agreement were fully rewritten and reexecuted in the same form, each of the parties hereto specifically reserving the same right to terminate by thirty (30) days' written notice, and binding themselves in the same manner as to sale and purchase of equipment as is provided in and by said agreement of March 1, 1923.

In witness whereof, the parties hereto have caused these presents to be executed in several counterparts, act of which so executed shall be deemed to be an original, the day and year first above written.

Southern Railway Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) The Cincinnati, New Orleans and Texas Pacific Railway Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) The Alabama Great Southern Railroad Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secre-[fol. 152] tary. (Seal.) New Orleans and Northeastern Railroad Company, by F. S. Wynn, Vice-President. W. S. Camp, Assistant Secretary. (Seal.) Georgia Southern and Florida Railway Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Northern Alabama Railway Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Blue Ridge Railway Company, by F. S. Wynn, Vice-President. Attest:

Guy E. Mauldin, Secretary. (Seal.) Carolina and Northwestern Railway Company, by F. S. Wynn, Vice-President. Attest: Guy E. Mauldin, [fol. 153] Secretary. (Seal.) Danville and Western Railway Company, by F. S. Wynn, Vice-President. Attest: Guy E. Mauldin, Secretary. (Seal.) High Point, Randleman, Ashboro and Southern Railroad Company, by F. S. Wynn, Vice-President. Attest: Guy E. Mauldin, Secretary. (Seal.) Yadkin Railroad Company, by F. S. Wynn, Vice-President. Attest: Guy E. Mauldin, Secretary. (Seal.) Mobile and Ohio Railroad Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) A. E. Smith, J. W. Fry, Receivers of Atlantic [fol. 154] and Yadkin Railway. In presence of: K. B. Parker, J. R. Smith. J. F. Gray, Receiver of Tallulah Falls Railway. In presence of Mercer Broach, Wm. H. Jarrell. Southeastern Express Company, by J. E. Skaggs, President. Attest: F. W. Woods, Secretary. (Seal.)

AGREEMENT

An agreement made this first day of March, in the year one thousand nine hundred and twenty-three, by and between Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia, hereinafter for convenience styled the "Railway Company", party of the first part, and the Southeastern Express Company, a corporation organized and existing under and by virtue of the laws of the State of Alabama, hereinafter for convenience styled the "Express Company", party of the second part.

Whereas, by an agreement dated April 28, 1921, made and entered into by and between the parties hereto, effective on the first day of May, 1921, and limited to continue in effect until the 28th day of February, 1923, and thereafter until terminated by six (6) months' notice, in writing, from either party to the other, the Railway Company contracted with the Express Company as therein provided,

concerning the transportation of express matter on the lines of railroad of the Railway Company, and business incidental thereto; and

Whereas, the parties hereto and to said agreement of April 28, 1921, by mutual agreement, have terminated the [fol. 155] said contract of April 28, 1921, and have elected to renew and extend their relations, by a new contract to become effective on the first day of March, 1923;

Now, therefore, this agreement of the parties hereto witnesseth:

That for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

Article I

Sec. 1. The express transportation business contemplated in this contract is understood to mean such express transportation business as is usually conducted by express companies and for the purpose hereof it is agreed that the express matter to be transported hereunder shall include all matter usually and customarily carried as express on passenger, express, or mail trains of railroads not including, however.

(a) Baggage of passengers and theatrical scenery and belongings when carried for regular passenger transportation.

(b) United States and railway mail and mail equipment

(c) Corpses accompanied by an attendant in charge,

(d) News trunks and property necessary in the conduct of usual news business,

(e) Supplies and material for the use of the Railway Company or contractors with the Railway Company on any line or portion of the system of the Railway Company,

(f) Local marketing and package commodities now carried on such of the trains of the Railway Company as it may permit to be used for such transportation.

The Railway Company as well as the Express Company shall have the right to carry on its passenger, express or mail trains

(g) Silk and tea imported from the Orient,

[fol. 156] (h) Newspapers,

(i) Dogs,

(j) Milk and cream and returned empty cans or containers therefor.

The Railway Company shall have the right to carry on such trains

(k) Equipment, supplies and property owned by any telegraph or telephone company, or by any other person or corporation, to which or to whom rights and privileges (other than the right or privilege of operating an express business) have been or may be, at any time during the life of this contract, granted by the Railway Company;

Provided, however, that nothing in this agreement shall be construed or interpreted to restrict or limit the right of the Railway Company to operate mixed trains, or to prevent the Railway Company from transporting horses, carriages, cattle, or other classes of freight, upon passenger trains when necessary in emergencies to avoid delay to freight shipments; and

Provided, further, that where the Railway Company is by contract, understanding or practice entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Railway Company hereby reserves such exclusive or joint right as to such commodities under this agreement; and

Provided, further, that no explosives, inflammable articles, or acids shall be considered express traffic except such as it may be lawful to transport on passenger trains when properly packed, marked and certified as required by the regulations of the Interstate Commerce Commission or other public authority, having jurisdiction in the premises, for the transportation of explosives, or by the rules of the American Railway Association.

The maximum weight to be carried in any of the cars carrying express matter shall not exceed the limit which in the judgment of the Railway Company is necessary for safety.

Articles which can only be loaded or unloaded through

delays to passenger trains in switching, shall not be accepted [fol. 157] by the Express Company unless a special car is furnished at the rate of charge for carload, and the Express Company shall not accept shipments which can not be so handled as to avoid unusual delays to the trains of the Railway Company; Provided, however, that nothing in this section contained shall be construed to prevent the Railway Company from performing any transportation service covered by a tariff now, or at any time during the life of this contract, in forms, or required by any present or future law.

Sec. 2. Said express transportation business shall be conducted in an honest, efficient and economical manner and under such rates, charges, classifications, rules, regulations, and practices and subject to such limitations and conditions as are now or may hereafter be lawfully established, Provided:

(a) that where carload rates are voluntarily made by the Express Company, the minimum weight shall not be less than that at the same time prescribed by the Railway Company for freight; and

(b) that, except by agreement with the Railway Company, rates voluntarily made by the Express Company shall not be less than twice the freight rate between the same points.

Article II

Sec. 1. The Railway Company agrees to let and demise, and by these present does let and demise, to the Express Company, the exclusive right and privilege, so far it may have the legal right to let such exclusive right and privilege to any one party, to control, conduct and transact all express transportation business over the lines and upon such passenger, express or mail trains of the said Railway Company as may be agreed between the Railway Company and the Express Company, operated or to be operated upon the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this contract, owned or leased, and operated by the Railway Company; subject, nevertheless, to the conditions and limitations in this contract contained.

Sec. 2. The Railway Company reserves the right to grant to other railroad companies, including electric lines, trackage rights over the lines of railroad of the Railway Company covered by this agreement, for the transaction of a [fol. 158] passenger and freight business of which the express business may be a part; Provided, however, and the Railway Company agrees, that such grant of trackage rights shall in no case be made to such an extent as to defeat the intention of a grant to the Express Company of substantially exclusive rights contemplated in this agreement for handling the business which has origin or destination on lines of the Railway Company.

Sec. 3. The Railway Company further agrees that it will not for compensation, transport valuables, money, goods or property of any description on its own account, or permit its officers, agents or employes to do so, on any of its passenger, express or mail trains, except that the Railway Company shall have the right hereby reserved to carry on its own account the articles enumerated in Section 1 of Article I.

Sec. 4. The Express Company may arrange, where necessary, for the proper conduct of its business, to compensate stage lines, water lines, short-line railroads, and electric lines, on tonnage, flat rate, or such other basis as may be most economical, and may make contracts with them to such effect;

Provided, however, that no such contract shall be entered into by the Express Company without first submitting the same to and obtaining the approval thereof by the Railway Company; and

Provided, further, that all earnings which may accrue to the Express Company under any such contract so made and approved shall be taken into the account between the Railway Company and the Express Company under this contract and be distributed in accordance with the terms hereof; and

Except, as to arrangements provided for in this section, the Express Company shall not enter into any contract different from this with any other carrier by rail unless and until the same shall have been submitted to and approved by the Railway Company.

Article III

Sec. 1. The Railway Company will carry and operate in such of its scheduled passenger trains as may be desig- [fol. 159] nated by it, such cars as may be necessary, at any time, and from time to time, to meet the reasonable requirements of the Express Company for express service to the public, will furnish to the Express Company suitable and adequate space in such cars to accommodate the business of the Express Company, and will transport therein the express matter, with the safes, packing trunks, train supplies and equipment of the Express Company, together with such of its messengers, helpers and guards as may be necessary for the handling and care of such express matter to destination or to proper transfer points; said cars to be properly lighted and heated by the Railway Company, and when devoted exclusively to express service, to be lettered "Southeastern Express".

Sec. 2. If the Railway Company shall elect at any time to operate a special train of express cars for expedition of traffic on its own account, no extra compensation shall accrue to the Railway Company therefor, but if the Express Company shall demand special train or car service to enable it at any time to compete for unusual traffic, or for any other purpose not contemplated in the usual service to be performed by the Railway Company hereunder, then and in such event, the Express Company shall pay to the Railway Company such extra compensation as may be fair and reasonable, and not in excess of the charge usually made by railroad companies for such services.

Sec. 3. In order that the Railway Company may not be required to transport more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Railway Company to the greatest extent practicable, and the Railway Company shall likewise have the right to use any unoccupied space in any car assigned to or supplied by the Express Company.

Sec. 4. Whenever the Express Company shall be called upon or may be required to accept an emergency shipment

of traffic originating on a railroad which does not own or control, or at the time have available, suitable cars for such traffic, and the Express Company shall find it necessary to, and does, with the consent of the Railway Company, rent live stock, refrigerator or other cars, to meet the requirements of any such specific shipment, the Railway Company agrees that it will assume the entire rental payment for such cars when the shipment moves exclusively [fol. 160] over its lines; and when the movement is partly over its lines and party over the lines of another or other railroads, the Railway Company shall assume such part of the rental charge as the proportion of the revenue of the Express Company on the shipment earned on the railroad of the Railway Company bears to the total revenue accruing to the Express Company on the shipment;

Provided, however, that when the shipper or shippers may be required to pay an additional charge for such privilege, the Railway Company and other railroad carriers, over whose lines such shipment may be transported, will be credited with such additional charge.

Sec. 5. The Railway Company agrees to stop its trains carrying express matter at stations where they are scheduled to stop in such position for convenient discharge of passengers, baggage, mail and express, and performance of station work, and for such time as will permit the Express Company, by the use of due diligence and sufficient force to be supplied by it, to load on and unload from express cars all express matter carried or to be carried on such trains, without unreasonable interference with the business of the Railway Company; and, under like conditions, the Railway Company will permit the Express Company, its employes, trucks and vehicles to have free access to and exit from the train while at such station, and the platform and terminal landing or depot existing at said station, for the handling, loading or unloading of property or express matter carried or to be carried on trains of the Railway Company. Nothing herein contained shall operate to interfere with the performance by the Railway Company of any of its obligations in respect of the carriage of the United States mails, or require the delay of trains at stations longer than reasonably necessary in the judgment of

the conductor in charge of the train to permit the Express Company to perform its work.

Article IV

Sec. 1. At stations where an employe of the Railway Company acts as agent for the Express Company, the Railway Company, to the extent that it may reasonably do so, will permit the Express Company to use, without rent or other charge, for the conduct of the express business such portion of the depot building now existing or hereafter [fol. 161] and during the life of this agreement erected at such station, with such of the appurtenances thereto as may be necessary for the proper conduct of the business of the Express Company.

Provided, however, that if, by agreement between the Railway Company and the Express Company, the Railway Company shall provide separate and distinct rooms or quarters for the exclusive use of the Express Company in any station building existing or hereafter erected at the cost of the Railway Company, then and in any such event the Express Company (unless otherwise agreed by the Railway Company) shall pay to the Railway Company such fair and reasonable rental, commensurate with the value of the premises so occupied, as may be agreed by the parties hereto, or a rental not proportionately in excess of rentals charged other tenants of like quarters in said building (if there be such); and in addition to such rental the Express Company shall pay to the Railway Company a fair and equitable proportion of the cost to the Railway Company of all necessary repairs, insurance, taxes and assessments, and of heat, light and water supplied to such premises by the Railway Company.

Sec. 2. If the Railway Company shall agree with the Express Company to provide or erect a separate building on the right of way or property of the Railway Company for the exclusive use of the Express Company, then the Express Company shall pay to the Railway Company for the use thereof such fair and reasonable rental commensurate with the value of the said building and the land upon which the same may be situate, as may be agreed by the parties hereto; and in addition thereto, the Express

Company will, at its own cost, maintain the said building in good repair, pay all taxes and assessments thereon, the cost of insurance on the said building, and all costs of heat, light and water supplied thereto by the Railway Company for the use of the Express Company.

Sec. 3. When and where it is agreed with the Railway Company that the Express Company itself shall erect a separate or distinct station or terminal building on the property of the Railway Company, then the Railway Company will lease to the Express Company at a fair rental, ground suitably situated which is not otherwise required for the purposes of the Railway Company.

Sec. 4. The Railway Company further agrees that it will [fol. 162] use its endeavors to procure for the Express Company, convenient and adequate office or warehouse facilities, if desired, for the transaction of express business, in union depots or stations at or in which the Railway Company has or may have arrangements for terminal facilities during the existence of this contract, on substantially the same terms and conditions as if the union depots or stations were owned by the Railway Company.

Article V

Sec. 1. In consideration of the covenants and agreements of the Railway Company herein set forth, to be by it duly kept and performed, the Express Company hereby agrees that it will, subject to adjustment as provided in Section 4 of this Article, pay to the Railway Company an amount equal to forty-seven and one-half (47.5) per cent of the total gross revenues of the Express Company derived from all express service on the lines of the Railway Company, for each month during the life of this agreement. Such payments to be made according to the following method:

The Express Company shall estimate, as nearly as may be practicable for it so to do, the amount payable to the Railway Company as its said monthly proportion of the said gross express revenues, and shall pay to the Railway Company on or before the twentieth day of each month the amount so estimated to be due as a result of the operations of the previous month. The actual amount due for each month shall then be ascertained by the Express Com-

pany as early as may be, and payment of any balance remaining due thereon shall be made to the Railway Company within ninety (90) days after the close of such month. If the actual amount due the Railway Company (for its forty-seven and one-half (47.5) per cent of the said gross express revenue) for such month shall be less than the amount already paid by the Express Company, under the provisions of this Section and Article, the Express Company shall have the right to deduct the amount of such overpayment from the next, or any succeeding payment due to the Railway Company hereunder.

The gross express revenues hereinbefore mentioned shall include the total gross transportation revenues which are collected by the Express Company for service performed on the lines of the Railway Company on both local and joint traffic, and the gross revenue on traffic passing over two or more railroads over which the Express Company [fol. 163] operates shall be divided on percentages, using first class express rates of each line as factors.

Sec. 2. The remaining fifty-two and one-half (52.5) per cent of the said gross express revenues, as hereinbefore defined, together with all other income of th- Express Company derived from all other sources, shall then be applied, so far as may be necessary, to the payment of the operating expenses of the Express Company.

Sec. 3. Any balance of the total gross revenues and income of the Express Company from all sources derived remaining after the payments hereinbefore in Section 1 and Section 2 of this Article provided, shall be divided (a) one-half to Southern Railway Company and the other railway companies which may become parties to this contract and (b) one-half to the Express Company. Southern Railway Company's proportion of the one-half herein provided to be paid to all railway companies parties to this contract shall be such proportion as the gross express revenue of the Express Company accruing on the lines of railroad of Southern Railway Company bears to the total gross express revenues accruing to the Express Company on the lines of Southern Railway Company and all other railway companies which may be or become parties to this contract with the Express Company.

The foregoing equal division half and half shall continue up to the point where the Express Company's one-half of said balance for the year shall equal ten (10) per cent of the present one million dollar ($1,000,000) stock issue of the Express Company, and thereafter the proportion to accrue to Southern Railway Company and the other railway companies of the said balance over said ten (10) per cent for the year shall be three-fourths (¾) and the Express Company's proportion shall be one-fourth (¼). Southern Railway Company's proportion of the three-fourths (¾) accruing to all railway companies so contracting with the Express Company shall be arrived at in the same manner as is above provided when the division shall be half and half.

Sec. 4. In order that the Express Company may, after paying its expenses and other charges, have left from all sources a fund applicable to dividends equal to seven (7) per cent per annum on the present one million dollars [fol. 164] ($1,000,000) stock issue of the Express Company, the Railway Company agrees that the forty-seven and one-half (47.5) per cent of gross express revenues paid or payable to it hereunder shall be reduced to make up any annual deficit when necessary to enable the Express Company to pay its operating expenses and other charges prior to dividends, including depreciation, and leave to the Express Company a fund applicable to such dividends, by deducting from the forty-seven and one-half (47.5) per cent of said gross express revenues to which the Railway Company will be entitled hereunder, such proportion of said deficit as the gross express revenues of the Express Company accruing on the lines of railroad of the Railway Company bears to the total gross express revenues accruing to the Express Company on the lines of Railway Company and all other railway companies which may be or become parties to this or a similar contract with the Express Company.

The readjustment, if any, of the sum payable to the Railway Company may be made by deducting the said proportion of such deficit so as to be due by the Railway Company from the forty-seven and one-half (47.5) per cent that would otherwise be due the Railway Company for the last month in the year for which the dividend fund is arrived at, and if such deduction does not produce the propor-

tionate contribution of the Railway Company, like deduction may be made in the next succeeding month or months or the matter otherwise adjusted as may be agreed between the parties. The yearly period in which said seven (7) per cent dividend fund shall be earned shall, for the purpose of this section, be the calendar year.

It is distinctly understood and agreed, however, that deductions from the proportion of gross express revenues accruing and payable to the Railway Company under this contract shall be made only for the purposes mentioned in this Article, as and only when necessary, as therein provided, and nothing in this contract contained shall operate to deprive the Railway Company of its share of forty-seven and one-half (47.5) per cent in each year of said gross express revenues of the Express Company hereinbefore mentioned: Provided, however, that if and when, by reason of deductions as in this Article provided, the sums paid to the Railway Company by the Express Company for any year of the life of this contract shall not have aggregated forty-seven and one-half (47.5) per cent, then and in such event, any deficit thereof shall be refunded by the Express Company to the Railway Company by payment or payments only out of such revenues as may be available there- [fol. 165] for (after payment of dividends and other expenses and charges prior thereto) during the following or any subsequent year of the life of this contract.

Article VI

The Express Company shall, as soon as practicable, furnish adequate and suitable equipment (other than the cars agreed to be furnished by the Railway Company), and shall use its agents and employes in operating an express transportation business on the lines of the Railway Company; and as the object and aim of this agreement is to obtain for the parties hereto successful results and to serve the public to best advantage, mutual co-operation is hereby pledged in securing as large a development as possible of the business to be so conducted, and each party hereto will assist the other in the effort to obtain the results desired.

Article VII

As between the Railway Company and the Express Company, the Express Company shall be liable:

(a) For any and all claims on account of loss of, or damage or delay to its own property, or the property of others in its charge carried under the provisions of this contract;

(b) For any and all injury to or death of its agents or employes while engaged in its business on any of the trains, lines or premises covered by this contract, including such injury or death to such agents or employes when traveling on the trains or being upon the premises of the Railway Company when the privilege of being transported on said trains or being upon said premises is secured under transportation or rights furnished or secured as such agents or employes of the Express Company under this contract;

(c) For any and all loss of or damage to property other than that mentioned in paragraph (a) of this Article (except as otherwise provided in this agreement as to any particular property), and for injury to, or death of, other persons than those mentioned in paragraph (b) of this Article, where such loss, damage, injury or death is due to, caused by, or contributed to by, the act or negligence of the Express Company, its officers, agents, or employes; Provided, however, that in claims for such loss or damage to such [fol. 166] other property, or injury to, or death of, such other persons, where it appears that the loss, or damage, or injury, or death was caused by the joint negligence of the Express Company and the Railway Company, the responsibility shall be joint, and in such event any loss shall be borne equally. The Express Company shall indemnify and save harmless the Railway Company or any agent or employe of the Railway Company against all claims, demands, suits and actions whatsoever, including expense of litigation, that may be begun against any of the same on account of any claim arising or growing out of the undertaking as above assumed, whether in law or in equity or before any compensation board, tribunal, or court whatsoever.

Article VIII

The Railway Company shall have the right to require the transportation, without charge by the Express Company, over any and all lines of the Railway Company of all packages of money, valuables, papers, and shipments of mater-

ia's and supplies ordinarily forwarded by express, used in the operation of the Railway Company; Provided, however, that the Express Company shall not be liable for any loss of or damage to such shipments so carried unless caused by the theft, dishonesty, negligence or other wrongful act of the employes of the Express Company. When the Express Company and the Railway Company employ the same agents, the receipt of the express messenger on the train for railway property shall constitute a delivery to the Express Company and the receipt of the party to whom the package may be addressed or of his representative shall constitute a delivery by the Express Company.

Article IX

Sec. 1. The Railway Company shall, so far as it lawfully may, transport upon the passenger and express trains of its lines, free of charge, the messengers, helpers and guards of the Express Company, and shall carry on trip passes to be issued by the Railway Company on proper application therefor, the agents and employes of the Express Company when engaged in conducting and handling the express business passing over the lines of the Railway Company, subject to the same rules and regulations as govern the free or reduced rate transportation of the agents and employes of the Railway Company; and officers having supervision of [fol. 167] express business on lines of the Railway Company will be provided with annual passes on proper application therefor.

Sec. 2. The Railway Company shall transport without charge any express matter that the Express Company may be now or hereafter privileged by law or authority of the Interstate Commerce Commission, or other body having jurisdiction, to carry free. It shall also transport free of charge upon the freight trains on the lines of the Railway Company, within reasonable distances, the equipment, material and supplies (excepting hay, grain and gasoline) of the Express Company required for use by the Express Company on such lines. It shall, so far as it lawfully may, also transport free of charge, equipment, stationery and office supplies of the Express Company in cars or parts of cars set apart for the use of the Express Company. The

Express Company assumes the risk of loss, damage or injury resulting from all such transportation, and agrees to indemnify and save harmless the Railway Company from all claims for loss, damage or injury, including expense of litigation, arising from such transportation.

Article X

The Railway Company will transmit, so far as it may be free to do so, without charge, over all telegraph or telephone lines owned or controlled by the Railway Company, business messages relating immediately and directly to the express transportation business of the Railway Company conducted by the Express Company (this excludes "commercial" business of the Express Company): Provided, however, that the Express Company releases and holds harmless the Railway Company from all liability arising from any error or delay in the transmission of such messengers or from failure to forward and deliver the same.

Article XI

Sec. 1. The Express Company may from time to time employ station and train employes of the Railway Company to act as agents and express messengers of the Express Company, subject to the rules of the Express Company; and the Railway Company may in like manner employ agents and express messengers of the Express Company to act as station and train employes of the Railway Company, subject to the rules of the Railway Company, but in both cases only by and with the approval of the original or pri- [fol. 168] mary employer of such employes and upon such terms as may be agreed upon by the two companies, and provided that such additional employment does not interfere with the full and prompt discharge of their duties to the original or primary employer.

Sec. 2. In the event that any injury, loss or damage is caused by a joint employe while engaged exclusively in the service of one of the parties hereto, liability therefore shall, as between the parties hereto, be exclusively the liability of the party in whose service such joint employe was at the time engaged.

If it cannot be determined whether, at the moment, such joint employe was engaged exclusively in the work of either of the parties hereto, then the Express Company and the Railway Company shall jointly assume liability and bear the costs and expenses of settlement in the proportion which the wages (including commissions) paid by each to the man or position held by him for the twelve months preceding the month in which the injury occurs, bears to the total of such wages and commissions for the same period, and in such case no settlement shall be made by either party without the concurrence in writing of the other.

Sec. 3. Liability for personal injury to or death of any joint employe, when it can be determined that such injury or death was sustained while the employe was engaged exclusively in express service, shall be borne by the Express Company, and the Express Company shall bear all costs and expenses incident to the settlement thereof. When it can be determined that such injury or death was sustained while the employe was engaged exclusively in railroad service, the Railway Company shall assume liability and bear all costs and expenses incident to the settlement thereof. In case of injury or death, where it cannot be determined whether at the moment the joint employe was employed in work exclusively for the Railway Company or exclusively for the Express Company, the Express Company and the Railway Company shall jointly assume liability and bear the cost and expense of settlement in the proportion which the wages (including commissions) paid by each to the man or position held by him for the twelve months preceding the month in which the injury occurs, bears to the total of such wages and commissions for the same period; in which latter case no settlement shall be made by either party without the concurrence in writing of the other.

[fol. 169]

Article XII

The Railway Company shall not be responsible for the loading, unloading or care of express matter.

Article XIII

All of the agents and employes of the Express Company while on the premises or on lines of the Railway Company

shall at all times conform to the general rules in force thereon, and in case any messenger or other employe on any such line or premises shall from any cause objectionable to the Railway Company, he shall be removed or discharged from service of the Express Company on any line of railroad of the Railway Company upon the written request of the Railway Company or the principal operating representative of the Railway Company.

Article XIV

If any difference or contention shall arise between the parties hereto respecting the rights or obligations of either party under this agreement or under any provision herein contained, or growing out of the operation of the lines of the Railway Company by the Express Company, which shall not be settled by conference, such difference or contention shall be adjusted and settled by an award to be made by three disinterested arbitrators or by a majority of them. The said arbitrators shall be selected by mutual agreement if possible.

If after a difference has arisen between the parties and they fail to agree upon the said three disinterested arbitrators within a period of ten days after written notice has been given by the complaining party, then each party shall select one arbitrator within twenty days, and the two arbitrators so chosen shall select a third arbitrator within twenty days after their appointment: and if for a period of twenty days after written notice of desire to arbitrate on the part of either party the other party shall fail to select an arbitrator in the manner aforesaid who shall accept the appointment, then and in that event the arbitrator so selected by the party not in default shall select an arbitrator for the defaulting party within ten days, and the two arbitrators so selected shall select a third within ten days after their appointment, and the three so chosen, or a majority of them, shall duly consider and decide such difference.

[fol. 170] In case said arbitrators, or a majority of them, for any reason shall fail to perform the duties imposed upon them within thirty days after the completion of the board, then the complaining party shall have the right to have selected, in like manner as above set forth, other arbi-

trators with like powers, duties and limitations, who shall proceed de novo to investigate and decide the questions involved as above provided. The cost and expense of the arbitration shall be certified by the arbitrators and be paid as awarded by them.

The award of the arbitrators, or of a majority of them, shall in all cases be final and conclusive between the parties.

Article XV

The Railway Company shall allow the Express Company, under the rules of the American Railway Association or similar body, the usual mileage or per diem rates on all cars owned, leased or controlled by the Express Company moving over the railroad lines operated and controlled by the Railway Company.

Article XVI

Sec. 1. The Railway Company agrees for the consideration hereinbefore named that it will also perform the service of switching cars incidental to the receipt and delivery of express matter at regularly established stations of the Express Company; and will perform the switching service necessary in delivering to or receiving from the usual point of interchange cars handled in through service with connecting railroads. The switching to be performed by the Railway Company to regular express stations includes, subject to the other paragraphs of this Section, necessary switching of express cars of live stock to and from stock chutes or stock yards for loading, unloading, feed, water or rest.

When cars are switched for account of the Express Company to or from places other than the regularly established stations of the Express Company tariff switching charges will be assessed against and paid by the Express Company.

When the movement of cars to or from connecting lines or to or from stock yards or stock chutes requires intermediate switching service to be performed by a third party, the charge for such intermediate switching shall be borne or otherwise provided for by the Express Company.

[fol. 171] Sec. 2. Adequate charges for demurrage on cars carrying car load traffic, so far as it lawfully may be

done, shall be assessed by the Express Company, in order to insure the prompt loading and unloading of express matter to and from cars on the line of the Railway Company; payments of such charges to accrue to the Railway Company; and the Express Company, will, if necessary, and it may legally do so, publish tariffs to cover demurrage.

Article XVII

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Railway Company shall be performed for account of the Express Company by the agency employed by the Railway Company for such purpose, the Railway Company agreeing that the charges for such service shall not be in excess of the total cost thereof to the Railway Company, and the Railway Company shall not be liable for any default of such agency.

Article XVIII

The accounts of the Express Company shall be kept in the form and manner now or hereafter prescribed in the Accounting Orders of the Interstate Commerce Commission, and such accounts and books of the Express Company pertaining to the business of the Railway Company shall at all times and places be open to inspection and subject to objection by the Railway Company.

Article XIX

It is hereby recognized that the revenue from the express business should be sufficient to constitute fair compensation not only to the Express Company, but also for the service of the Railway Company in such business, and that rates should from time to time be established adequate to produce such revenue, and that such rates should be properly related to the rates for passenger, mail and freight transportation. The Express Company hereby agrees, therefore, to take such action to secure such rates as may at any time become necessary either before the Interstate Commerce Commission or before the several state commissions, or both.

[fol. 172] Article XX

It is agreed that in the event, at any time during the continuance of this contract, any other line or lines of railroad shall be operated by the Railway Company not embraced within the terms of this contract such line or lines being free to contract with the Express Company, said line or lines are hereby declared to come within the terms and to be bound by this contract, and the Railway Company undertakes to keep such other lines free to contract, as aforesaid, so far as it may lie in its power so to do.

Article XXI

This agreement shall take effect as of the date hereof, and, unless sooner terminated as hereinafter provided, shall continue in force and effect for five (5) years, that is, until midnight, the 29th day of February, 1928; Provided, however, that either party hereto shall have the right to terminate the same upon the conditions hereinafter set forth upon giving to the other thirty (30) days' notice, in writing, of the election of the party serving the notice to terminate this agreement; and Provided, further, that if this agreement shall be terminated by notice from the Railway Company to the Express Company, as aforesaid, before the expiration of five (5) years from the date hereof, *i. e.*, before the 29th day of February, 1928, then and in such event, the Railway Company, and such other railway companies as may become parties to this contract and which may join in the notice of termination, will purchase, and the Express Company will sell to them, within ninety (90) days after the date of the termination of this contract, the equipment of the Express Company employed in the conduct of its business on the lines of all railway companies parties to this contract, at a price or sum which added

(a) to the appraised value of the equipment of the Express Company on any line of railway of any party to this contract which may not join in the notice of cancellation, and

(b) to the sum realized on the sale of all other property, rights and privileges of the Express Company, and

(c) to the net cash assets of the Express Company,

will equal the invested capital of the Express Company not exceeding one million dollars ($1,000,000).

[fol. 173] And the Railway Company, party to this agreement, hereby agrees to purchase at a value arrived at by appraisal in a manner to be agreed upon so as to yield the sum needed, that part of such equipment of the Express Company employed on the line of the Railway Company, and to purchase at a value arrived at by appraisal in the manner agreed upon, such part of any off-line (meaning not local to any rail line with which the Express Company may have a contract) equipment of the Express Company as the express earnings of the Railway Company for the previous year bears to the total express earnings for the previous year of the Railway Company and all railway companies parties to this or a similar contract with the Express Company.

Where such equipment is joint as between two or more lines, parties to this or a similar contract, with the Express Company, the proportion of such equipment to be purchased by each at a value arrived at as hereinbefore stipulated shall be the proportion that the express earnings of such railway company bears to the total rail line express earnings for the previous year at said joint station, or upon railroads or premises used in such joint operation.

Provided, further, that if this agreement shall be terminated by notice from the Express Company to the Railway Company, as aforesaid, before the expiration of Five (5) Years from the date hereof, i. e., before the 29th day of February, 1928, then, and in such event, the Express Company agrees that the equipment of the Express Company employed in the conduct of its business on the lines of the Railway Company and the lines of other railway companies (which by adoption of this contract may become parties to the same or may make similar contract with the Express Company), over which the Express Company operates, may, at the option of the Railway Company, be purchased by this and such other railway companies on like terms and conditions as set forth in the foregoing proviso defining the terms of purchase in the event of termination by the Railway Company.

In witness whereof, the parties hereto have caused this agreement to be executed, signed, sealed and delivered in duplicate (each part being an original) by their respective officers thereto duly authorized, the day and year first above written.

Southern Railway Company, by Fairfax Harrison, [fol. 174] President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Southeastern Express Company, by J. B. Hockaday, President. Attest: F. W. Woods, Secretary. (Seal.)

The Southeastern Express Company and the undersigned corporations severally subscribe this agreement which is attached to and incorporates herein the foregoing agreement of Southern Railway Company with Southeastern Express Company, dated March 1, 1923, with full knowledge of the subject matter and contents thereof, for the purpose of adopting, and do hereby adopt the same, as a contract between each of the subscribers and the said Southeastern Express Company, by which each of the subscribers hereto will be bound, and of which each will have the benefit to the fullest extent applicable to each of the undersigned commensurate with each subscriber's interest and responsibility in the subject matter of said contract, as contemplated thereby, with the same intent and purpose and with like effect as if each of the subscribers had been formally joined as a party with said Express Company to a separate contract in the same form and of like import.

In witness whereof, the subscribers have each caused this endorsement to be executed in their corporate names and attested by their corporate seals, by their proper officers thereunto duly authorized, this first day of March, 1923.

The Cincinnati, New Orleans and Texas Pacific Railway Company, by F. S. Wynn, Vice President. Attest: W. S. Camp, Assistant Secretary. (Seal) [fol. 175] The Alabama Great Southern Railroad Company, by F. S. Wynn, Vice President. Attest: W. S. Camp, Assistant Secretary. (Seal.) New Orleans and Northeastern Railroad Company, by F. S. Wynn, Vice President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Georgia Southern

and Florida Railway Company, by F. S. Wynn, Vice President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Northern Alabama Railway Company, by F. S. Wynn, Vice President. Attest: W. S. Camp, Assistant Secretary, (Seal.) At-
[fol. 176] lantic and Yadkin Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Blue Ridge Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Carolina and Northwestern Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Danville and Western Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Hartwell Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) High
[fol. 177] Point, Randleman, Ashboro and Southern Railroad Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Tallulah Falls Railway Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Yadkin Railroad Company, by F. S. Wynn, Vice President. Attest: Guy E. Mauldin, Secretary. (Seal.) Mobile and Ohio Railroad Company, by F. S. Wynn, Vice-President. Attest: W. S. Camp, Assistant Secretary. (Seal.) Southeastern Express Company, by J. B. Hockaday, President. Attest: F. W. Woods, Secretary. (Seal.)

[fol. 178] Atlanta, Ga., 2/19/29.

I do hereby certify that this is a true copy of contract in effect between Southeastern Express Company, Southern Railway Company and the other companies herein named.

F. W. Woods, Secretary Southeastern Express Company.

Letter from Munford, Hunton, Williams and Anderson, dated May 11, 1921, enclosing two certified copies of the agreement between the Southern Railway Company and Southeastern Express Company.

Southern Railway System, Law Department

Munford, Hunton, Williams & Anderson, Assistant Division Counsel

Richmond, Va., May 11, 1921.

Re Southeastern Express Company—Domestication in Virginia

Mr. R. T. Wilson, Clerk State Corporation Commission, Richmond, Virginia.

DEAR SIR: In accordance with the understanding had with the Commission at the time of the issuance to the Southeastern Express Company of a license to do business in this State, we beg to hand you herewith two certified copies of the agreement between the Southern Railway and the Southeastern Express Company for filing in your office along with the other documents pertaining to the domestication of said Company in this State as a foreign corporation.

Yours very truly, Munford, Hunton, Williams & Anderson, Asst. Division Counsel.

TBG-C.

[fol. 179] Memorandum of decision of the State Corporation Commission in the matter of Southeastern Express Company.

Commonwealth of Virginia, State Corporation Commission, Richmond

William F. Rhea, Chairman; Alexander Forward, Berkley D. Adams, Legal and Securties Division; J. R. Tucker, Counsel to Commission; Richard T. Wilson, Clerk of the Commission.

MEMORANDUM OF DECISION OF COMMISSION IN THE MATTER OF SOUTHEASTERN EXPRESS COMPANY FOR LICENSE TO TRANSACT BUSINESS IN THE STATE

May 4, 1921.

On April —, 1921, the Southeastern Express Company, a corporation chartered under the laws of Alabama for the

purpose of transacting the business of an express company, applied to the Commission for a license authorizing it to transact its business in this State under the provisions of Secs. 3845 and 3847 of the Code.

In view of the provisions of Sec. 163 of the Constitution, the Commission was in doubt as to whether or not it had the power to grant such license to a foreign public service corporation and took time to consider its decision in the matter.

On April 30th, Messrs. Robert B. Tunstall and Henry W. Anderson appeared before the Commission and fully argued the case for the express company, and the Commission ordered the issuance of license in conformity with the application.

The provision of Sec. 163 of the Constitution above referred to is as follows.

[fol. 180] "No foreign corporation shall be authorized to carry on in this State the business or to exercise any of the powers or functions of a public service corporation * *. But this section shall not effect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State when this Constitution goes into effect."

Counsel for the Commission called attention to the ruling of the Commission in the matter of Inland Navigation Company (see memorandum of counsel, September 23, 1919), in which the Commission ruled that the exceptions to the general rule set out in Sec. 163 related only to corporations engaged in business or whose line or route extended across the boundary of the Commonwealth at the time "when this Constitution goes into effect." In other words, that the language quoted referred to both of the classes of corporations included within the exception.

Counsel for the express company argued that the language above quoted related only to the latter of the two classes of corporations mentioned in the exception; namely, to corporations "actually engaged in (business) within this State" and had no application to public service cor-

porations "whose line or route extends across the boundary of this Commonewealth". It was the view of counsel for the company that two classes of corporations were protected by the exception aforesaid; namely, those public service corporations engaged in interstate commerce, and whose line or route passed into, out of, or through the State, and, second, foreign corporations doing a purely domestic business who had been authorized to operate within the State by law prior to the enactment of the Constitution.

It was argued by counsel that to require a corporation engaged in interstate commerce to become incorporated in the State of Virginia as a prerequisite to carrying on local business, would render Sec. 163 of the Constitution obnoxious to the Federal Constitution, in the light of the decisions of the Supreme Court in Crutcher v. Kentucky, 141 U. S. 47, and Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, and that since it was a primary rule of construction that all statutes must be given a construction which would render them valid, if possible, the Commission should construe the words "when this Constitution goes into effect" as relating solely to the next [fol. 181] preceding language and as having no application to corporations engaged in interstate commerce, whether so engaged at the time the Constitution went into effect or thereafter.

The Commission adopted the construction contended for by counsel for the express company and hence decided:

1. A foreign public service corporation engaged in interstate commerce may be licensed to transact business in this Southeastern Express Company for license to transact busi- the Code in spite of the provisions of Sec. 163 of the Constitution.

2. The license fee required in such case is the fee required by sec. 38 (a) of the Revenue Act, in spite of the fact that a domestic corporation chartered by the State for the purpose of carrying on a similar business might be required, under sec. 37 of the Revenue Act, to pay a larger fee for such privilege.

I have examined the foregoing memorandum of counsel, which correctly states the Commission's decision and the reasons therefor.

—— —— Chairman.

Commonwealth of Virginia, Department of the State Corporation Commission

I, R. T. Wilson, Clerk of the State Corporation Commission, do hereby certify that the foregoing is a true copy of Memorandum of Decision of Commission in the matter of Southeastern Express Company for license to transact business in the State, dated May 4, 1921.

I further certify, That this paper is now filed and preserved as a permanent record in this office.

In testimony whereof I hereunto set my hand and affix the Official Seal of the State Corporation, at Richmond, this thirteenth day of February, A. D. 1929.

R. T. Wilson, Clerk of the Commission. (Seal Corporation Commission.)

[fol. 182] Copy of the order and certificate of the Commission authorizing the American Railway Express Company to do business in Virginia; similar order and certificate, in the matter of the Southeastern Express Company.

CERTIFICATE OF AUTHORITY

STATE CORPORATION COMMISSION

City of Richmond, 26th Day of July, 1918.

It is ordered that a certificate of authority to do business in Virginia be issued to *he* American Railway Express Company and is here recorded with the certificate from the Auditor of Public Accounts, in the words and figures following:

C. B. Garnett, Chairman.

Commonwealth of Virginia, Department of the State Corporation Commission.

Richmond, Va., July 26th, 1918.

This is to certify, that American Railway Express Company, chartered under the laws of Delaware, a foreign corporation, having complied with all the requirements im-

posed upon it by law, is hereby authorized to transact its business of —— in the State of Virginia, subject to all the laws of the State applicable to said Company and its business.

State Corporation Commission.

Attest: T. G. Strachan, First Assistant Clerk. (Seal.)

CERTIFICATE OF AUTHORITY

STATE CORPORATION COMMISSION

City of Richmond, 2nd Day of May, 1921.

It is ordered that a certificate of authority to do business in Virginia be issued to Southeastern Express Company [fol. 183] and is here recorded with the certificate from the Auditor of Public Accounts, in the words and figures following:

Wm. F. Rhea, Chairman.

Commonwealth of Virginia, Department of the State Corporation Commission

Richmond, May 2, 1921.

This is to certify that Southeastern Express Company chartered under the laws of Alabama a foreign corporation having complied with all the requirements imposed upon it by law, is hereby authorized to transact its business in the State of Virginia, subject however to all the laws of the State applicable to said Company and its business.

State Corporation Commission.

Attest: R. T. Wilson, Clerk of the Commission. (Seal.)

The letters dated June 9, 1914, and June 26, 1914, from the Chairman of the Commission to Charles W. Stockton, Esq., in the matter of the application of Wells-Fargo Company to do business in Virginia.

Copy

Commonwealth of Virginia, State Corporation Commission, Richmond

June 9th, 1914. rrp-w.

Chas. W. Stockton, Esq., General Counsel, Wells Fargo & Company Express, New York City.

My Dear Sir: Your letter of June 8th, addressed to the Clerk of this Commission, has been referred to me.

[fol. 184] Replying thereto I would say that under the Virginia Constitution, Section 153, express companies are public service corporations, and under Section 163 foreign corporations are forbidden to exercise any of the powers or functions of public service corporations. So that it will be impossible for Wells Fargo & Company, Express, to conduct its business in this State. The only way by which it could be done would be to organize a Virginia corporation, all of the stock of which could be held by Wells Fargo & Company, Express, the foreign corporation.

Very truly yours, —— ——, Chairman.

rrp.
Carbon Copy.

Copy

Commonwealth of Virginia, State Corporation Commission, Richmond

June 26, 1914. rrp-w.

Chas. W. Stockton, Esq., General Counsel, Wells Fargo & Company Express, New York City.

My Dear Sir: I have your letter of June 20th, enclosing brief with reference to the desire of Wells Fargo & Company to engage in intrastate express business in Virginia.

Replying thereto I would say that recognizing the force of your brief and the authority upon which you rely—Western Union Telegraph Company vs. Kansas, 216 U. S. 163, I write to say that as at present advised this Commission will take no step to prevent Wells Fargo & Company, Express, from taking over the business of the United States

Express Company in this State on July 1st. It must not be understood, however, that this Commission conceded the right of the company to do any intrastate business whatever. It must be further understood that this Commission [fol. 185] does not, either for its present or future membership, waive any legal right or authority to enforce any or all of the Virginia statutes which may be violated by Wells Fargo & Company, Express, in connection with such intrastate business as it proposes to do.

We note that there are some Virginia statutes to which you allude in your brief which you appear to concede the State's powers to enforce, and I presume that it is your purpose to comply with these statutes.

Very truly yours, —— ——, Chairman.

rrp.

Copy of the Certificate issued by the Clerk of the Commission, dated June 29, 1914, refusing said application of the Wells-Fargo Company.

CERTIFICATE

File A 69-17697

Commonwealth of Virginia, Department of the State Corporation Commission

I hereby certify that the following fees were tendered this office by Wells Fargo & Company, Express, and declined by the State Corporation Commission:

1. Fee of $1.00, for recording one copy of power of attorney in office of Secretary of the Commonwealth:

2. Fee of 20c per one hundred words for recording one copy of the charter of the corporation in office of the Secretary of the Commonwealth:

3. Fee of $30.00 for entrance fee based on alleged capital of $50,000 in the State:

4. Fee of $5.00 to cover costs in office of the State Corporation Commission for entering and issuing certificate of authority to do business in Virginia.

In testimony whereof I hereunto set my hand, at Richmond, this 29th day of June, 1914.

R. T. Wilson, Clerk State Corporation Commission.

[fol. 186] File A 69-1797

Received of Wells Fargo & Company Express, a corporation organized and existing under the laws of the State of Colorado, a written power of attorney, executed in duplicate, appointing John O. Carty, a resident of Virginia, statutory agent; also duly authenticated copies in duplicate of the charter of said corporation.

(Signed) R. T. Wilson.

Richmond, Va., June 29th, 1914.

Certificate of Clerk that no certificate of authority to do business in Virginia was ever issued to Wells-Fargo Company.

CERTIFICATE

I, R. T. Wilson, clerk State Corporation Commission, do hereby certify that there is of record no certificate of authority to do business in Virginia issued to Wells Fargo & Company, Express, or order of the Commission directing the issuance thereof.

In testimony whereof I hereunto set my hand at Richmond, this 8th day of April, 1929.

R. T. Wilson, Clerk State Corporation Commission.

Interstate Commerce Commission Decision

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7322[1]

Securities and Acquisition of Control of Railway Express Agency, Incorporated

Submitted February 6, 1929. Decided February 11, 1929

[fol. 187] 1. Authority granted the Railway Express Agency, Incorporated, to issue 1,000 shares of capital stock

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[1] This report also embraces Finance Docket No. 7316, Express Contract, 1929.

without nominal or par value and $32,000,000 of 5 per cent serial gold bonds, series A, said stock and bonds to be sold for cash at not less than $100 a share for the stock and 97¾ per cent of par and accrued interest for the bonds, and the proceeds used to pay for the properties to be acquired from the American Railway Express Company and for working capital.

2. Acquisition of control of the Railway Express Agency, Incorporated, jointly by the participating railroads which execute the agreement with agents, dated July 2, 1928, by purchase of capital stock in the number of shares indicated in appendix A, approved and authorized.

3. Article V of proposed operating agreement, in so far as it provides for a division of earnings among carriers in specified groups, approved and authorized.

Robert J. Cary, Marcus L. Bell, J. P. Blair, Henry W. Clark, C. B. Heischman and F. C. Nicodemus, Jr., for applicants.

Luther M. Walter, W. H. Day, J. H. Beek, and W. H. Chandler for National Industrial Traffic League, intervenor.

Bird M. Robinson and Ben B. Cain for American Short Line Railroad Association.

John E. Benton for National Association of Railroad and Utilities Commissioners Railroad and Warehouse Commission of Minnesota, and Corporation Commission of Arizona.

Robert Morgan for Brotherhood of Railway Clerks.

REPORT OF THE COMMISSION

CAMPBELL, Commissioner:

William B. Storey, Wallace W. Atterbury, Patrick E. Crowley, and Carl R. Gray, agents appointed by agreements executed as of July 2, 1928, by certain railroads, hereinafter called the Participating Railroads, carriers by railroad subject to the interstate commerce act, and the Railway Express Agency, Incorporated, hereinafter called the [fol. 188] Express Agency, a corporation organized for the purpose of engaging in the express transportation business, and to handle, transport, and forward property by rail-

road subject to the act, on December 26, 1928, filed a joint application for authority (a) under paragraph (2) of section 5 of the interstate commerce act for the Participating Railroads to acquire control of the Express Agency by purchase of its capital stock, (b) under paragraphs (1) to (8) of section 20a of the act for the Express Agency to issue 1,000 shares of capital stock without nominal or par value and not exceeding $35,000,000 of 5 per cent serial gold bonds, series A, and (c) under paragraph (12) of section 20a for officers and directors of the Participating Railroads and other carriers subject to that section to hold at the same time positions as officers and directors of the Express Agency. The same parties on December 18, 1928, also filed a joint application, Finance Docket No. 7316, under and to the extent required by paragraph (1) of section 5 of the act for an order approving and authorizing the form of a proposed operating agreement. The National Industrial Traffic League was granted permission to intervene in these proceedings. At the hearing held on January 24, 1929, so much of the application in Finance Docket No. 7322 as requests authority for the officers and directors of the Participating Railroads to hold positions as officers and directors of the Express Agency was withdrawn inasmuch as separate applications were being filed by the persons asking for authority to serve as interlocking officers and directors. No representations have been made by State authorities except the Public Service Commission of Nevada, and no objection to the granting of the applications has been presented to us.

About six months after the beginning of the Federal control period, the express business of the United States transported by railroads was taken over and conducted by the American Railway Express Company, hereinafter called the Express Company, and since the termination of Federal control that company has continued to so operate, except the express business carried on the lines of the Southern Railway system. By our order in Consolidation Express Cos., 59 I. C. C. 459, we approved and authorized the consolidation of the express transportation business and prop- [fol. 189] erty devoted to that business of the Adams, American, Wells Fargo & Company, and Southern express companies into the Express Company. In our report in

that proceeding it was stated that those four companies whose properties were thus consolidated operated over approximately 92 per cent of the railroad mileage of the country and transacted approximately 95 per cent of the express business.

After the termination of Federal control the Express Company conducted its business on the lines of the respective railroads over which it continued to operate pursuant to the terms of contracts executed between it and each of the railroads, which contracts were known as the Uniform Express Contract, and were approved and authorized, in part, by our order in Express Contract, 1920, 59 I. C. C. 518. Some modifications were made as of March 1, 1923, in the then existing contracts which thereafter were known as the Amended Uniform Express Contract, and will hereinafter be referred to as the amended contracts. Substituted Article XX of the amended contracts provides that:

All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and inter-dependent, and shall take effect on March 1, 1923, and the agreement effective September 1, 1920, as hereby amended, shall continue in force until midnight on February 28, 1929.

In the event the Express Company does not continue express operations over the lines of the Rail Company after midnight on February 28, 1929, then at that time the Rail Company shall purchase from the Express Company and the Express Company shall sell to the Rail Company, at cost less the depreciation chargeable under Article V, Section 4, item (e) of this contract, all property of the Express Company used in its express operations hereunder located on the lines of the Rail Company. The Rail Company hereby confirms the depreciation rates now and heretofore used by the Express Company and said rates shall be continued to the termination of this contract subject to the provisions of said Article V, Section 4, item (e).

The agents exercising the powers conferred by the Participating Railroads, as hereinafter described, have notified the Express Company that the Participating Railroads will not renew the amended contracts upon their expiration or enter into negotiations for any new contracts with it for the [fol. 190] operation of express transportation business on

their respective railroads, and the Express Company will discontinue express operations over the lines of the Participating Railroads after midnight February 28, 1929, under Substitu-ed Article XX of the amended contracts.

Knowing that the amended contracts above mentioned would expire on February 28, 1929, and that some definite action would have to be taken then for conducting the express business, the Uniform Express Contract Committee of the Association of Railway Executive- appointed a legal committee to prepare an agreement for the purchase of the stock of the Express Company, or the formation of a new express company. The legal committee submitted its report and plan, referred to hereinafter as the plan, dated June 21, 1928, for the future conduct of the express business. The plan, as adopted, has as its objective to provide for the future conduct of the express business through a separate agency, but in effect a joint facility of the railroads controlled by them through stock ownership. Briefly, the plan contemplated the organization of a new company, the Express Agency, to conduct and transact the express business, the execution by the Participating Railroads of two agreements, one conferring upon the agents certain powers, and the other to be executed with the Express Agency and to contain the terms and conditions under which the Express Agency is to operate over the lines of the Participating Railroads and such other railroads as may execute that form of agreement. The principal features of the plan are given below.

As the first step to carry out the plan, each of the Participating Railroads was required to execute as of July 2, 1928, a separate agreement with the agents, irrevocably appointing the agents above named as its agents and attorneys to represent it in all matters pertaining to the carrying out of the plan and ratifying all that the agents should do by virtue of the agreement. The several agreements with the agents were to become effective when executed by a sufficient number of the railroads shown in appendix A to this report as to represent in the aggregate 75 per cent of the gross express business, as determined by the perentages appearing in that table. Agreements have been executed to the extent necessary to render the plan effective. By the execution of the agreements each of the Participating Rail-

roads assents to the plan and assigns to the agents all its right, title, and interest under substituted Article XX of the amended contracts, as above set forth, and in and to all [fol. 191] property of the Express Company used in its express operations and located upon the line of the railroad executing the agreement. Upon the organization of a new express company, the agents were authorized to assign to that company the rights previously assigned to them under Article XX of the amended contracts, and the new company or the agents were empowered to exercise and enforce the right vested in the railroad to purchase the properties of the Express Company located on its line. Each of the railroads, listed in Appendix A, which execute the agreement, subscribes for its proportionate number of shares of the capital stock of the new company and agrees to pay therefor $100 a share. Each railroad also agrees to execute with the new company an operating agreement to cover the conduct of the express business on its railroad after the Express Company discontinues operations.

The 86 railroads listed in appendix A, and comprising substantially all the members of the Association of Railway Executives, are represented as doing nearly 89 per cent of the gross express business under the amended contracts, although it was testified that over 300 short line railroads are parties to such contracts. The relative standing in the list, the percentages shown, and the number of shares of stock of the Express Agency allotted to each railroad were determined by the ratio that the express business handled on each company's line, measured by receipts, bore to the gross business handled by all the Participating Railroads, using as a basis for such computations the average for the years 1923 to 1926, inclusive.

Acting under the powers conferred by the agreements between the carriers and the agents, the latter have procured the incorporation on December 7, 1928, under the laws of the State of Delaware, of the Railway Express Agency, Incorporated, to engage in, conduct, and carry on in and between any and all of the States of the United States and the District of Columbia, the territories, colonies, and possessions of the United States, and in foreign countries, as agent or otherwise, the express transportation business, and to handle, transport, and forward property by railroad. Other

large and varied powers are given to the Express Agency, but a recital thereof is unnecessary herein. The Express Agency's capital stock is to consist of 1,000 shares without nominal or par value, and the holder thereof may not sell, transfer, or otherwise dispose of its holdings except to a successor corporation by consolidation, merger, or purchase, without first offering such share or shares to the corporation [fol. 192] for purchase at the price at which the shares were issued, and, so far as may be lawful, the subscription, purchase, or other acquisition of the Express Agency's shares of stock is to be limited to railroad corporations. The certificate of incorporation also requires that the number of directors and the method of nominating them as provided in the by-laws shall not be changed except with the consent of the holders of two-thirds of the stock.

The by-laws of the Express Agency provide for a board of 15 directors, of which 14 are to be nominated by districts. For that purpose the continental United States has been divided into the Eastern, Southern, and Western Districts. Six directors are to be nominated by members of the Eastern District, three by members of the Southern District, and five by members of the Western District. Each railroad owning shares of stock of the Express Agency is deemed to be a member of the District in which its line of railroad is located, or, if located in more than one district, of the district in which the greater portion of its single-track mileage is located. The boundaries of the three districts and the allocation of certain railroads to the Eastern District are shown in the margin.

Under date of January 23, 1929, the Express Company and the agents entered into an agreement which provides that the Express Company shall sell and the agents purchase certain properties owned by the Express Company as of February 28, 1929, consisting of all equipment of every kind, all buildings, whether on land owned or not owned by the Express Company, the parcels of land listed in a memorandum annexed to the agreement, and all material and supplies. The material and supplies are to be acquired at their book value, the equipment and buildings at their book value, less depreciation, and the parcels of lands at an agreed amount of $8,270,000, which was determined after both parties had appraisals made and found that the sepa-

rate appraisals were nearly in agreement. The purchase price for all the properties was fixed at $30,313,000, subject to any adjustments that may be necessary because of changes that may occur up to the time the actual transfer takes place. No adjustment, however, is to be made in the agreed price for the land.

The terms and conditions covering the transfer of the properties are contained in the agreement with the Express Company and provide, among other things, that the latter will surrender to the agents control of all offices and operat- [fol. 193] ing and office organizations, operating records and accounts, the agents reserving the right to take into service or to dismiss from service thereafter any officers or employees of the Express Company. The agents will liquidate and settle the accounts of the Express Company outstanding on February 28, 1929, arising from the conduct of the Express Company's business during the Uniform Express Contract and the Amended Uniform Express Contract periods, assuming and paying all liabilities whether recorded or unrecorded, and defending or settling all claims, demands, and suits grow-

The Eastern District is to be bounded by the Atlantic seaboard from the Canadian boundary to Norfolk, Va., by the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., by the main line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio, by the Ohio River from Cincinnati, Ohio, to Cairo, Ill., by the Mississippi River from Cairo, to the mouth of the Illinois River at or near Grafton, Ill., by the Illinois River from Grafton, Ill., to Pekin, Ill., by a line south and east of the Atchison, Topeka & Santa Fe Railway from Pekin, Ill., through Joliet and Streator, Ill., to Chicago, Ill., by a line drawn from Chicago, Ill., to include the Southern Peninsula of Michigan and thence following the Canadian boundary to the Atlantic seaboard. The Norfolk & Western Railway and the Chesapeake & Ohio Railway are to be included in the Eastern District.

The Southern District is to be bounded by the Atlantic seaboard on the east, by the southerly line of the Eastern District on the north, by the Mississippi River on the west, and by the Gulf of Mexico on the south.

The Western District is to be bounded by the westerly lines of the Eastern District and the Southern district on the east, by the Gulf of Mexico and the Mexican boundary on the south, by the Pacific Ocean on the west, and by the Canadian boundary on the north.

ing out of such business. For the purposes above stated the Express Company will transfer to the agents all contract assets and contract asset accounts existing on February 28, 1929. The agents will assume all obligations of the Express Company under its employees' pension system to continue all pensions heretofore granted, or which may be granted prior to March 1, 1929, and to recognize the pension rights under that system, of all officers or employees [fol. 194] of the Express Company taken into the service of the agents. The agreement contemplates the transfer of the properties as of midnight on February 28, 1929, but provision is made for extending the time to later dates to and including June 1, 1929. The agreement is binding upon and inures to the benefit of the parties thereto and their respective successors and assigns. The agents will assign their interests in this agreement to the Express Agency. By this assignment the matters and things above set forth to be undertaken and performed by the agents will in fact be performed by the Express Agency.

Uniform operating agreements are to be executed between the Express Agency and each participating railroad that executed the agreement of July 2, 1928, with the agents, and identical agreements are to be executed with such other railroads as heretofore have executed the amended contracts and will grant the Express Agency permission to conduct the express business on their lines. The agreement is to cover a period of 25 years beginning March 1, 1929, and continuing until midnight on February 28, 1954. Under its terms each railroad will appoint the Express Agency as the exclusive agent for conducting and transacting all the express transportation business on its line. The agreements set forth the terms and conditions to govern the conduct of the express business, the equipment and facilities to be furnished, the rentals payable by either party for use of property of the other, arrangements for joint employees and liability as between the parties for damages, injuries, etc. Under section 3 of Article II of

this agreement the Express Agency may engage by means of motor truck, air craft, or other instrumentality than railroad trains, in the transportation of property which would otherwise be transported on trains of the railroad executing the agreement, but only with the consent of that company and of other carriers executing like agreements which would participate in such transportation if conducted by railroad. Under section 2 of the article stated the railroad reserves the right to transport any property independently of the agreement by means of motor truck, air craft, or other instrumentality than railroad trains, and to perform in connection therewith the auxiliary service known as pick-up and delivery. Provision is made in Article V as to the procedure to be followed in determining the earnings available for payment to the Participating Roads. The particulars of that article will be considered later herein. To insure and to preserve a proper and equi- [fol. 195] table proportion of all competitive business to the companies executing the operating agreement with the Express Agency, the latter agrees to divide the competitive traffic upon a fair and equitable basis between the carriers, giving due consideration to the distribution of competitive traffic handled by the carriers during the three years ended December 31, 1928, and to the elements of service, direct routing, car supply, and terminal facilities.

While the plan contemplates that the ownership of the Express Agency's capital stock and the control of that company will be limited to those railroads shown in appendix A which execute the agreement with agents, the privilege of participating in the operating agreements will not be confined to such railroads, but will be extended to all short-line railroads now parties to the uniform express contracts and the amended uniform express contracts. That privilege will enable the shortline railroads to share in any benefits to be derived from the conduct of the express business by a railroad controlled agency upon the same terms and conditions as the Participating Railroads. The difference in the status of the shortline railroads and of the truck lines in respect to the Express Agency is that the latter will exercise control over the Express Agency through ownership of its stock. However, it is stated that the holding of stock of the Express Agency would confer

little, if any, advantage to the short lines as they handle only about 2 per cent of the gross express business conducted under the amended contracts, and the amount of stock that would have been issuable to the respective short-line railroads under the method of allotment followed would have been so small a fraction of a share for each company as to make the adoption of such a plan impracticable and the holding of stock of practically no consequence. Furthermore, the earnings of the Express Agency will not be distributed to the stockholders as dividends in proportion to their stock holdings, but the net revenues will be paid over to the Participating Railroads upon the basis of gross revenues for each company as will be hereinafter described. Another benefit that will accrue to the short-line railroads is that although under the terms of substituted Article XX of the amended contracts each of them is obligated to purchase at the termination of the contract on February 28, 1929, the property of the Express Company located on its line, it will be relieved from using its cash or credit for that purpose, as the method of financing the pur-[fol. 196] chase of the Express Company's properties by the Express Agency provides that the latter will obtain the necessary funds by the issue of its 5 per cent serial gold bonds.

The agents have forwarded to the short-line railroad companies two copies of the proposed form of operating agreement to be executed by the several companies. At the same time there was also transmitted for execution an assignment of those companies' rights under substituted Article XX of the amended contracts, whereby the short-line railroad executing the assignment would assign to the agents its rights under the article mentioned and would assign, transfer, and set over to the agents all its right, title, and interest in and to all property of the Express Company located on its lines. In consideration for such assignment, the agents agree to assume the obligation of the railroad under Article XX to purchase the property of the Express Company located on the line.

The testimony is that of the 86 railroads shown in appendix A, all but five at the date of the hearing had approved the plan and four of those were in the process of approving it.

The Express Agency proposes to file prior to February 28, 1929, with this commission and with each State commission, or elsewhere as may be required, its adoption, as its tariffs effective March 1, 1929, of the then existing tariffs of the Express Company.

The general balance sheet of the Express Company as of November 30, 1928, shows real property and equipment $46,572,610, other investments $7,235,522, current assets $34,405,896, deferred assets $183,095, unadjusted debits $1,475,616, capital stock $34,642, current liabilities $24,796,676, deferred liabilities $1,700,558, unadjusted credits $25,350,847, including $20,494,949 accrued depreciation on buildings and equipment, and corporate surplus $3,382,659. That balance sheet does not give the segregation between contract and corporate accounts or between land, buildings, and equipment. It has been stated above that the agreement of January 23, 1929, between the Express Company and the agents provides for the acquisition of the building and equipment at book value, less depreciation, material and supplies at book value, and that contract assets and contract asset accounts were to be turned over to the agents to enable the balance sheet of the Express Company as of September, 1928, it appears that the depreciated book value of buildings and equipment was $20,882,819, and that the [fol. 197] amount of material and supplies was $1,461,298. These amounts added to the agreed price of $8,270,000 for land, makes a total of $30,614,117, or an amount in excess of the purchase price of $30,313,000. However, the agreement provides for the adjustment of the purchase price to the actual figures as at the closing date, and thus any changes occurring in the accounts because of additions, retrials and accrued depreciation will be taken care of in the final statement.

To procure the funds with which to purchase the properties of the Express Company and to provide working capital in addition to that which will be provided by the issue of capital stock, the Express Agency proposes to issue $32,000,000 of 5 per cent serial gold bonds, series A, the application for authority to issue $35,000,000 of bonds having been amended at the hearing.

The Express Agency proposes to make, under date of March 1, 1929, an indenture to the Guaranty Trust Com-

pany of New York, as trustee, providing for a total issue of $50,000,000 of serial gold bonds which will not be secured by a lien on physical property, but by an assignment to the trustee of the Express Agency's rights, under the operating agreements herein described. Under the proposed indenture bonds may be issued in series, and all bonds of one series are to be identical except as to the dates of maturities, denominations, and appropriate differences as between coupon and registered bonds. Under article four of the proposed indenture the Express Agency will covenant that so long as any of the serial gold bonds are outstanding it will not create any mortgage or encumbrance on its physical properties unless the bonds then outstanding are secured by a lien on the property so mortgaged prior to the lien of the mortgage so created; that it will not mortgage or pledge its rights under the operating agreements except in subordination to the lien of the indenture; that so long as any of the bonds are outstanding it will not create or incur any indebtedness (other than current operating indebtedness) which, together with the amount of bonds then outstanding, will exceed $50,000,000, unless such debt is expressly subordinated to all bonds issued under the indenture; that all indebtedness to the Participating Railroads will be subordinate to the bonds, and that so long as any of the bonds are outstanding it will, before making any payment to the Participating Railroads of any sums due to them under the operating agreements set aside out of the net receipts for each six months' period ended June 30 and December 31, as a sinking fund, an amount equal to the [fol. 198] principal amount of bonds which are due and payable in such six months' period.

The bonds proposed to be issued presently have been designated series A. They will be dated March 1, 1929, will be issued as coupon bonds registerable as to principal in the denomination of $1,000, will be redeemable at the Express Agency's option as a whole on March 1, 1939, or on any interest date option as a whole on March 1, 1939, or on any interest date thereafter at their principal amount and accrued interest plus a premium for each serial maturity of one-fourth of 1 per cent for each six months between the date of redemption and the date of maturity, will bear interest at the rate of 5 per cent per annum, payable semi-

annually on March 1 and September 1 in each year, and will mature in 40 semiannual installments of $800,000 each, beginning September 1, 1929, and ending March 1, 1949.

It appears that the gross charges of the Express Company for transportation for the years 1925, 1926, 1927, and for the first 11 months of 1928, were $290,303,042, $294,519,014, $284,512,701, and $255,726,926, respectively. On the basis of express operations of the Express Company for 1925 to 1928, inclusive, the net receipts of that company for those years which, under the proposed operating agreements, would have been available, after deducting all operating expenses, for interest on and principal of the proposed series-A bonds, are respectively as follows: $138,632,841, $142,569,117, $134,511,013, and $135,600,000. The last amount includes partially estimated figures for four months. The interest and principal installment requirements for the first year will amount to $3,180,000, which requirements decrease each year as the maturing installments are paid. From these comparisons it appears that it may reasonably be expected that the Express Agency will earn many times over the yearly interest and principal requirements of the bonds, and will have substantial earnings for distribution to the railroads entitled thereto. It should also be observed that at the end of 20 years the proposed $32,000,000 of bonds will have been retired, leaving the Express Agency without any funded debt; unless during that period it should issue, after having obtained our authorization to do so, all or a part of the remaining $18,000,000 of bonds that may be issued under the proposed indenture.

Arrangements have been made, subject to our approval to sell the series-A bonds to J. P. Morgan & Company and [fol. 199] Kuhn, Loeb & Company at 97¾ and accrued interest. On that basis the average annual cost to the Express Agency will be approximately 5.307 per cent.

The agents also asked for our approval, under and to the extent required by paragraph (1) of section 5 of the interstate commerce act, of the form of the proposed operating agreement which is to be executed by the Participating Railroads and by other short-line railroads that become parties thereto. Some of the provisions of that agreement have been given above and we there stated that Article V of the

agreement would be dealt with later. The particular portion of the operating agreement to which our jurisdiction extends and which requires our approval under paragraph (1) of section 5 is the pooling of earnings arrangement embodied in Article V, which is given in full in appendix B. In Express Contract, 1920 supra, we had under consideration a similar pooling arrangement which is now a part of the existing uniform express contracts. Our report in that proceeding and the action taken thereon are controlling in the instant applications. In its material terms the pooling arrangement in Article V of the proposed operating agreement is substantially the same as in that article of the uniform express contracts, any differences being due to the fact that as now constituting the Express Company is privately owned and operated for profit, while the Express Agency will be controlled by the Participating Railroads, and the earnings remaining after accounting for all items of income and deductions therefrom will be designated "rail transportation revenue" and paid to the carriers within specified groups that are entitled to receive it. In arriving at the amount of such revenue, provision is made under item (j) of section 4 of this article for deducting certain profit and loss debit items therein enumerated, including surplus applied to sinking funds or set aside for investment in physical property. The effect of this will be to reduce the operating revenues of the railroad carriers which they derive from express traffic by amounts which are in reality appropriations of surplus. It should be understood that all that we are here passing upon is the plan for pooling and dividing earnings and we are not passing upon other provisions of the contract, such as that mentioned above. Nothing herein contained is to be construed as an expression of opinion upon the propriety of such deductions in connection with the determination of recapturable income under section 15a of the interstate commerce act. To carry out [fol. 200] the pooling arrangement to distribute earnings, the Participating Railroads and other carriers on whose lines the Express Agency will conduct its operations have been divided into four groups, except as any line or lines may be assigned hereafter to a different group by us for rate-making purposes. The groups are Eastern, Southern, Western and Mountain-Pacific. Each group includes gen-

erally the carriers operating in the territory embraced within its limits and which have executed the operating agreement. The boundaries of the respective groups are the same as defined by us in Increased Rates, 1920, 58 I. C. C. 220, except that the Mountain-Pacific group is to include carriers operating in Alaska, Hawaii, British Columbia, the Yukon, and Mexico.

Paragraph (1) of section 5 provides that we may only give our approval and authorization to an arrangement of the kind here under consideration if assented to by all the carriers involved. As all the Participating Railroads and such short-line railroads as shall execute the proposed operating agreement must of necessity assent thereto, our finding will extend only to those agreements that have been or may hereafter be executed in accordance with the condition stated.

Upon the facts presented we find:

1. That the issue of 1,000 shares of capital stock without nominal or par value, and $32,000,000 of 5 per cent serial gold bonds, series A, by the Express Agency (a) is for lawful objects within its corporate purposes, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes;

2. That the acquisition by the Participating Railroads of control of the Express Agency by purchase of its capital stock will be in the public interest and that the consideration to be paid for the stock is just and reasonable; and

3. That the proposed grouping of carriers and division of earnings in accordance with the terms of Article V of the proposed operating agreement will be in the interest of [fol. 201] better service to the public and economy in operation, and will not unduly restrain competition, and that the consideration as between the carriers and the terms and conditions of said division of earnings are just and reasonable.

An appropriate order will be entered.

EASTMAN, commissioner, concurring:

While I regard the use of stock without par value as generally objectionable, for reasons which I have sufficiently indicated in other cases, the matter is of inconsequential importance here.

I take this occasion to point out, however, that in our regulation of express rates for the future it will be necessary, if we are to do more than guess at reasonable rates, to know the cost of the service which the railroads perform in connection with the express business. This will have to be done either by sporadic cost studies or by a revision of railroad accounting so that this cost will currently be segregated from other railroad costs instead of being mixed inextricably with them. This question is not now before us, but it is plain that it will inevitably confront us in due time.

Appendix A

Statement Showing the Railroads Afforded Opportunity to Participate in Control Railway Express Agency, Incorporated, Percentages of Gross Express Business Transported by, and Number of Shares Allotted to, Each

	Percentages	Shares of stock
1. The New York Central Railroad Company	14.426	144
2. The Pennsylvania Railroad Company	12.608	126
3. The Atchison, Topeka & Santa Fe Railway Company	4.608	46
4. Southern Pacific Company	4.469	45
5. The New York, New Haven & Hartford Railroad Company	4.402	44
6. The Baltimore and Ohio Railroad Company	3.869	39
7. Chicago and North Western Railway [fol. 202] Company	3.288	33
8. Illinois Central Railroad Company	2.864	29
9. Chicago, Burlington & Quincy Railroad Company	2.670	27
10. Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2.647	26

	Percentages	Shares of stock
11. Erie Railroad Company	2.549	25
12. Union Pacific Railroad Company	2.532	25
13. Boston and Maine Railroad	2.290	23
14. The Chicago, Rock Island and Pacific Railway Company	2.230	22
15. Louisville & Nashville Railroad Company	2.021	20
16. Missouri Pacific Railroad Company	1.989	20
17. Atlantic Coast Line Railroad Company	1.956	20
18. Seaboard Air Line Railway Company	1.586	16
19. Great Northern Railway Company	1.468	15
20. St. Louis-San Francisco Railway Company	1.404	14
21. The Delaware, Lackawanna and Western Railroad Company	1.369	14
22. Reading Company	1.246	12
23. Wabash Railway Company	1.229	12
24. Missouri-Kansas-Texas Railroad Company	1.173	12
25. Northern Pacific Railway Company	1.172	12
26. The Central Railroad Company of New Jersey	1.070	11
28. Lehigh Valley Railroad Company	.995	10
29. Norfolk and Western Railway Company	.853	9
30. Pere Marquette Railway Company	.709	7
31. Richmond, Fredericksburg and Potomac Railroad Company	.668	7
32. The Texas and Pacific Railway Company	.655	7
33. Canadian National Railway Company.	.647	6
34. Central of Georgia Railway Company	.621	6
35. Minneapolis, St. Paul & Sault Ste. Marie Railway Company	.605	6
36. Florida East Coast Railway Company	.598	6
37. The Chicago & Alton Railroad Company	.573	6
38. The Denver and Rio Grande Western Railroad Company	.545	5

	Percentages	Shares of stock
39. Chicago and Eastern Illinois Railway [fol. 203] Company	.545	5
40. The Delaware & Hudson Company	.488	5
41. Maine Central Railroad Company	.474	5
42. The New York, Chicago and St. Louis Railroad Company	.417	4
43. The Nashville, Chattanooga & St. Louis Railway	.414	4
44. St. Louis Southwestern Railway Company	.371	4
45. Chicago Great Western Railroad Company	.368	4
46. The Colorado and Southern Railway Company	.317	3
47. Chicago, Indianapolis & Louisville Railway Company	.311	3
48. The Kansas City Southern Railway Company	.289	3
49. The Western Pacific Railroad Company	.236	2
50. Atlantic and West Point Railroad Company	.233	2
51. The New York, Ontario & Western Railway Company	.206	2
52. The Minneapolis and St. Louis Railroad Company	.142	1
53. Northwestern Pacific Railroad Company	.142	1
54. Central Vermont Railway Company	.139	1
55. Buffalo, Rochester and Pittsburgh Railway Company	.130	1
56. Norfolk Southern Railroad Company	.123	1
57. Atlanta, Birmingham and Coast Railroad Company	.084	1
58. Western Maryland Railway Company	.080	1
59. Bangor and Aroostook Railroad Company	.076	1
60. The Wheeling and Lake Erie Railway Company	.068	1
61. The Virginian Railway Company	.065	1

	Percentages	Shares of stock
62. The Duluth, South Shore and Atlantic [fol. 204] Railway Company	.063	1
63. The Ann Arbor Railroad Company	.044	1
64. The Ulster and Delaware Railroad Company	.043	1
65. Midland Valley Railroad Company	.039	1
66. Gulf, Mobile and Northern Railroad Company	.037	1
67. Clinchfield Railroad Company	.037	1
68. Bessemer and Lake Erie Railroad Company	.030	1
69. Chicago and Western Indiana Railroad Company	.027	1
70. New Orleans Great Northern Railroad Company	.025	1
71. Louisiana & Arkansas Railway Company	.024	1
72. Winston-Salem Southbound Railway Company	.021	1
73. Fort Smith and Western Railway Company	.021	1
74. The Denver & Salt Lake Railway Company	.021	1
75. The Trinity and Brazos Valley Railway Company	.015	1
76. Detroit, Toledo and Ironton Railroad Company	.016	1
77. Georgia, Florida & Alabama Railway Co.	.014	1
78. Nevada Northern Railway Company	.011	1
79. Buffalo and Susquehanna Railroad Corporation	.009	1
80. The Huntington and Broad Top Mountain Railroad and Coal Company	.007	1
81. Lake Superior & Ishpeming Railroad Company	.005	1
82. The Akron, Canton & Youngstown Railway Company	.005	1
83. Canadian Pacific Railway Company	.005	1

	Percentages	Shares of stock
84. Cumberland and Pennsylvania Railroad	.005	1
85. Abilene and Southern Railway	.004	1
86. Lehigh and New England Railroad Company	.002	1
	100.000	999

[fol. 205] APPENDIX B

Article V

In addition to other payments herein provided for the Express Company shall account to the Rail Company, as hereinafter in this Article provided.

Sec. 1. Upon carload shipments consigned from one consignor to one consignee at one destination, moving under rates which exclude vehicle service, the Express Company shall first pay to the Rail Company 85 per centum of the gross revenue accruing on its lines from the rail haul (not including in the gross revenue from the rail haul and charges separately ascertainable for refrigeration, partial loading or unloading in transit and other accessorial services), the remaining 15 per centum of such gross revenue from the rail haul, together with the charges for any separate vehicle service, refrigeration, partial loading or unloading in transit and other assessorial services, shall remain in the revenue of the group (item (a), Sec. 4, of this Article) in which such charges accrue.

Sec. 2. The railroads and other carriers on the lines of which the Express Company conducts operations shall be divided into the groups described as follows, except as any line or lines may hereafter be assigned to a different group by the Interstate Commerce Commission in its grouping for rate making purposes:

(A). Eastern Group—Including generally the carriers operating in the territory embraced in the following limits: the Atlantic seaboard from the Canadian border to Norfolk, Va., the main line of the Norfolk & Western Railway from

Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Ill., the Mississippi River to the mouth of the Illinois River, at or near Grafton, Ill., the Illinois River from Grafton, Ill., to Pekin, Ill., a line south and east of the Atchison, Topeka and Sante Fe Railway [fol. 206] from Pekin, Ill., through Joilet and Streator, Ill., to Chicago, Ill., a line drawn from Chicago, Ill., to include the southern peninsula of Michigan, and thence following the international boundary to the Atlantic seaboard; including that portion of the Virginian Railway extending south of the southern boundary (excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line extending north of the southern boundary), and all other carriers mentioned in Exhibit A hereto, whether located in the United States or not, and any other lines located in the territory covered by the Eastern Group over which the Express Company may hereafter operate.

(B). Southern Group—Including generally the carriers operating in the territory commonly known as the southern classification territory, embracing that section of the United States lying west of the Atlantic Ocean; south of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Chesapeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Ill.; thence east of the Mississippi River to New Orleans, La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile and Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line Railway extending north of the northern boundary (excluding that portion of the Virginian Railway extending south of the northern boundary), and all other carriers mentioned in Exhibit B hereto, whether located in the United States or not, and any other lines located in the territory covered by the Southern Group over which the Express Company may hereafter operate.

(C). Western Group—Including generally the carriers operating in the territory lying west of the Western bounda-

ries of the eastern and southern groups as above described; south of Lake Superior and of the international boundary line; north of the Gulf of Mexico and the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the state of North Dakota and the state of Montana and the boundary line between the states of South Dakota and Wyoming and Ne- [fol. 207] braska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo, and Trinidad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, New Mexico, to Albuquerque, New Mexico; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Texas, and all other carriers mentioned in Exhibit C hereto, whether located in the United States or not, and any other lines located in the territory covered by the Western Group over which the Express Company may hereafter operate.

(D). Mountain-Pacific Group—Including generally the carriers operating in the territory lying between the north and south line, described in paragraph (C) hereof, and the Pacific Coast, also carriers operating in Alaska, Hawaii, British Columbia, the Yukon and Mexico, and all other carciers mentioned in Exhibit D hereto, whether located in the United States or not, and any other lines located in the territory covered by the Mountain-Pacific Group, over which the Express Company may hereafter operate.

The lines embraced in the several groups are more particularly set forth in Exhibits A, B, C, and D, attached hereto and made a part of this agreement, it being understood that said Exhibits shall prevail in case of any minor departures contained therein from the geographical descriptions of groups above given.*

Sec. 3. The gross express transportation revenues accruing on each railroad or other carrier in the several groups,

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*In the contract for execution these exhibits omitted from this draft will be included.

including the lines of the Rail Company party to this agreement, shall be ascertained by crediting each railroad or other carrier with the express revenue earned wholly thereon and prorating the revenue accruing between points involving transportation on the lines of two or more carriers, as follows:

The gross transportation revenues accruing from the carriage of express matter on the line of the Rail Company [fol. 208] when carried by the Express Company partly on and partly beyond the line of the Rail Company, where rates applicable to rail transportation charge of the Express Company as the local first class express rate per 100 lbs. between points where carried on the line of the Rail Company bears to the sum of the local first class express rates per 100 lbs. between points where carried on the several lines or routes operated by the Express Company over which such express matter moved.

Sec. 4. When used in this Section and in Sections 5 and 6 of this Article—

The term "Uniform System of Accounts" means the Uniform System of Accounts for Express Companies, now or hereafter prescribed by the Interstate Commerce Commission.

The term "Classification" means one of the several groups of accounts embraced in the Uniform System of Accounts, such as the Classification of Operating Revenues.

The term "Form of Income Statement" means the form for stating income accounts embraced in the Uniform System of Accounts.

The term "Carload Business" means that carload business which is described in Section 1 of this Article.

All references in this Section to classifications, captions, names and numbers of accounts and forms of statements mean the classifications, captions, names and numbers of accounts and forms of statements as embodied in the Uniform System of Accounts, issue of 1914.

There shall be ascertained the following items of income accruing from express operations on the lines of all railroads and other carriers or instrumentalities of transportation over which or by means of which the Express Company

performs service within each group for each month during which this agreement shall remain in effect. Such items of income shall be defined in the Uniform System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, viz:

(a) Total charges for transportation (including charges based upon value), less amounts paid by the Express Com- [fol. 209] pany under Section 5, Article XVI, hereof, not included in operating expenses, and less the 85 per centum of carload revenue payable by the Express Company under Sec. 1 of this Article. This item shall include the operating revenues II "Transportation" in the Classification of Operating Revenues, after deducting the 85 per centum of carload revenue referred to herein.

(b) Total revenues from Operations other than Transportation. This item shall include operating revenues of the Express Company as defined in General Account III, "Operations Other than Transportation" in the Classification of Operating Revenues.

(c) Other Income. This item shall include all other income of the Express Company.

(d) Profit and Loss Credits. This item shall include the following accounts:

403. Profit on Real Property and Equipment Sold.
404. Delayed Income Credits.
405. Unrefundable Overcharges.
406. Miscellaneous Profit and Loss Credit.

From the total of items (a) to (d) inclusive, shall be deducted the following charges and items of expense as defined in the Uniform System of Accounts or the rulings of the Interstate Commerce Commission in connection therewith, for the group for the same period:

(e) All Operating Expenses of the Express Company, including depreciation and the several payments, expenses and indemnities undertaken by the Express Company referred to in Articles IV, VII, VIII, IX, X, XI and XVII.

The depreciation mentioned above shall be at the rates used on February 28, 1929, by the American Railway Express Company or as fixed hereafter by action of the Board

of Directors of the Express Company, or by the Interstate Commerce Commission.

[fol. 210] (f) Compensation to carriers, over the lines of which the Express Company operates, not parties to this form of agreement.

(g) Uncollectible Revenue from Transportation.

(h) Express Taxes.

(i) Other Deductions. This item shall include accounts listed under Caption III, "Deductions from Gross Income" and under Caption IV "Disposition of Net Income" except Account 329 entitled "Dividend Appropriations of Income" in the form of Income Statement.

NOTE.—Included in this item shall be the amount paid or sustained, if any, as interest and discount on funds borrowed and expended by the Express Company to acquire any of the properties of the American Railway Express Company and/or additional property and equipment necessary for use in the express business.

(j) Profit and Loss Debits. This item shall include the following accounts:

409. Surplus Applied to Sinking and other Reserve Funds.
411. Surplus Set Aside for Investment in Physical Property.
413. Debt Discount Extinguished Through Surplus.
414. Miscellaneous Appropriations of Surplus.
415. Loss on Land.
416. Delayed Income Debits.
417. Miscellaneous Profit and Loss Debits.

NOTE.—The basis for the apportionment among the groups affected, of operating expenses and other charges, included in items (e) to (j) inclusive, which are common to more than one group, shall be the basis in effect on February 28, 1929, under the Amended Uniform Express Contract or as may be hereafter determined by the Board of Directors of the Express Company.

[fol. 211] The balance remaining shall be designated as "Rail Transportation Revenue" and shall be distributed

among the carriers in the group executing this form of agreement, including the Rail Company party to this agreement, in the proportion that the gross express transportation revenues on other than carload business for the month earned on the line of each such carrier bears to the gross express transportation revenues on other than carload business earned on the lines of all such carriers in that group for that month.

Sec. 5. The Express Company shall estimate as nearly as my be the amount payable to the Rail Company as its monthly proportion of the "Rail Transportation Revenue", under Section 4 of this Artcle, and shall pay to the Rail Company on or before the last day of each month the amount so estimated to be due as a result of operaeach such month shall be ascertained by the Express Comtions of the previous month. The actual amount due for each such month shall be ascertained by the Express Company as nearly as may be, and payment of any balance remaining due thereon shall be made to the Rail Company within 120 days after the close of each month. If the actual amount due the Rail Company for the business of such month shall be less than the amount already paid by the Express Company under the provisions of this paragraph, the Express Company shall have the right to deduct the amount of such overpayment from the next or any succeeding payment due to the Rail Company hereunder.

After the accounts, for any month have been closed they shall not be reopened to include adjustments affecting such month, unless in the judgment of the Board of Directors of the Express Company, the amount of such proposed adjustment is sufficiently large to warrant such reopening and the restatement of the accounts. Other necessary adjustments in the accounts under this Article shall be included in the first current open month's accounts after discovery which will admit of their inclusion without delay to the rendering of that month's accounts.

With respect to any and all claims, demands, charges and expenses of every kind and character whatsoever, for which the Express Company may be or become liable, or earning in which the Rail Company may be interested, arising or growing out of the express business on the Rail Company's lines, but not ascertained, definitely fixed, or charged on

the Express Company's books at the termination of this [fol. 212] agreement, in the final settlement between the parties hereto, such claims, demands, charges, expenses or earnings shall be estimated and allowed as may be determined by the General Accounting Officers of the parties, and in case of their failure to agree, shall be determined as provided in Article XIV hereof.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 11th Day of February, A. D. 1929

Finance Docket No. 7322

Securities and Acquisition of Control of Railway Express Agency, Incorporated

Finance Docket No. 7316

Express Contract 1929

A hearing and investigation of the matters and things involved in these proceedings having been had, and the commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Railway Express Agency, Incorporated, be, and it is hereby, authorized to issue not exceeding 1,000 shares of capital stock without nominal or par value and not exceeding $32,000,000 of 5 per cent serial gold bonds, series A, under and pursuant to an indenture to be made by it under date of March 1, 1929, to the Guaranty Trust Company of New York, as trustee; said bonds to be dated March 1, 1929, to be in the form, denomination, and redeemable as provided by the indenture and as set forth in the report aforesaid, to bear interest at the rate of 5 per cent per annum, payble semiannually, and to mature in 40 equal semiannual installments of $800,000, beginning September 1, 1949; said stock to be sold to certain participating railroads at not less than $100 a share, and said bonds to be sold at not less than 97¾ per cent of par and accrued interest, and the pro-

ceeds of such securities used to pay the purchase price of the properties to be acquired form the American Railway Express Company and for working capital as set forth in the applications and report aforesaid.

[fol. 213] It is further ordered, That except as herein authorized, said stock and bonds shall not be sold, pledged, repledged, or otherwise disposed of by the Railway Express Agency, Incorporated, unless and until so ordered by this commission.

It is further ordered, That, within 10 days after the execution of said trust indenture, the Railway Express Agency, Incorporated, shall file a certified copy thereof with this commission.

It is further ordered, That the Railway Express Agency, Incorporated, shall report concerning the matters herein involved in conformity with the commission's order dated February 19, 1927, respecting applications filed under section 20a of the interstate commerce act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, or as to said bonds, or interest thereon, on the part of the United States.

It is further ordered, That the Railway Express Agency, Incorporated, in filing schedules, establishing or adopting rates and charges applicable on the lines of railroad over which it shall conduct its express business, shall, in such schedules, refer to this order by title, date, and docket number.

It is further ordered, That the acquisition by such of the railroads shown in appendix A to the report herein as shall execute the agreement with agents, dated July 2, 1928, of control jointly of the Railway Express Agency, Incorporated, by purchase of its capital stock in the respective number of shares shown in said appendix, be, and it is hereby, approved and authorized.

It is further ordered, That Article V of said proposed operating agreement be, and it is hereby, approved and authorized solely in so far as it provides for a division of earnings for which the commission's approval and authorization is required under paragraph (1) of section 5 of the interstate commerce act.

And it is further ordered, That nothing herein shall be construed as approving any particular provisions of Ar-

[fol. 214] ticle V or of any other part of said proposed operating agreement.

By the commission.

George B. McGinty, Secretary. (Seal.)

Letter of Wyndham R. Meredith, dated March 20, 1929, in regard to opinion and action of Com-troller General of U. S., Hon. J. R. McCarl.

Wyndham R. Meredith, Attorney-at-Law, 800 Travelers Bldg., Richmond, Va.

March 20, 1929.

Hon. Louis E. Epes, Chairman State Corporation Commission, City.

In re Railway Express Agency, Inc., Permit to do Business

Dear Mr. Epes: I beg to call the attention of Mr. Fletcher and yourself to the most recent holding of the Federal authorities on one of the points presented by me in the matter of the application of the Railway Express Agency, Incorporated, to do business in that State. Since 1878 the Federal Government has held that the charges of express companies were not subject to land grant deductions, but that full charges would have to be paid on all Government shipments by express. This ruling was based on the fact that the old express companies were separate entities and were common carriers in their own right and the Government had no privity of contract with the railroads as to express traffic.

A contrary opinion has recently been rendered by Comptroller General J. R. McCarl, an account of which is contained in the United States Daily of March 16, 1929. His reasons are that under the carrying of express matter by the Railway Express Agency, Incorporated, the Agency is directly and exclusively under the control of the railroads, and in the final analysis, it is operating the express business for the benefit of the railroads. There appears [fol. 215] to be no question but that the Railway Express Agency, Incorporated, is merely an instrumentality or adjunct not only of the participating railroads, but of all railroads taking advantage of the new agency. Under

such conditions, he holds that the corporate entity of the express agency should be disregarded and that express service should be held to be performed by the railroads themselves instead of through the agency of the express company. His conclusion is, therefore, that express charges on Government shipments handled by the Express Agency beginning March 1, 1929, will be subject to land-grant deductions when transportation is over land-grant railroads. He further holds that it is a well established rule of law that two corporations may be treated as one in disregard of fictional legal distinction (1) when necessary to circumvent fraud, or (2) where a corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality or adjunct of another corporation. The opinion cites: 34 Op. Aty. Gen. 353; in re Watertown Paper Co., 169 Fed. 252; Chicago Mill Etc. Co. vs. Boatmen's Bank, 234 Fed. 41; Hunter vs. Baker Eec. Co., 235 Fed. 1006; Clere Clothing Co. vs. Union Etc. Bank, 224 Fed. 363; Jos. R. Foard Co. vs. Md., 219 Fed. 827. See also American Chain Co. vs. Stewart-Warner Etc. Corp., D. S. Southern D. of N. Y. Feb. 23, 1929.

Yours very truly, Wyndham R. Meredith, Counsel for Railway Express Agency, Inc.

WRM-R.

Order and Opinion of the Commission in This Case

BEFORE STATE CORPORATION COMMISSION OF VIRGINIA, RICHMOND

Case No. 3900

[fol. 216] EX PARTE In re RAILWAY EXPRESS AGENCY, INCORPORATED

Application for Certificate of Authority to do Business in Virginia

ORDER AND OPINION—April 8, 1929

For reason stated in writing filed in the papers in this cause, It is Ordered, that the application filed on March 4, 1929, by Railway Express Agency, Inc., a corporation

chartered under the laws of Delaware, for a certificate of authority under Sec. 3847 of the Code of Va., to do an intrastate express business in Virginia is denied; without prejudice, however, to the right of Railway Express Agency, Inc., to engage in interstate commerce in Virginia without having received a certificate of authority to do business in Virginia under Sec. 3847 of the Code.

Ex Parte In re Railway Express Agency, Incorporated

Application for Certificate of Authority to do Business in Virginia

Opinion by Epes, Chairman:

The Railway Express Agency, Incorporated, is a corporation chartered under the laws of the State of Delaware by certificate of incorporation filed in the office of the Secretary of State of Delaware on December 7, 1928. Its principal purpose as stated in its certificate of incorporation is to do a general express business.

On January 25, 1929, it made application to the State Corporation Commission of Virginia for a certificate of authority to do business in Virginia in accordance with Sec. 3847 of the Code of Virginia. The Commission informally refused to grant this application, as it stated in a letter dated Jan. 28, 1929, from Commissioner Epes to Messrs. Hunton, Williams, Anderson & Gay, attorneys for the applicant, who presented the application. A copy of this letter is made a part of the record in this proceeding at the request of the applicant.

[fol. 217] On March 4, 1929, the application was formally renewed before the Commission (Chairman Epes and Commissioner Fletcher sitting), at which time, in addition to the formal papers required by the statute to be filed as a prerequisite to granting a certificate of authority to do business under Sec. 3847, the applicant introduced before the Commission, and asked to have made a part of the record, the testimony of several witnesses and certain documents, including a "Memorandum of Decision of Commission", dated May 4, 1921, which is filed in the records of the State Corporation Commission of Virginia in the matter of the application of Southeastern Express Company for a cer-

tificate of authority to do business in Virginia under Sec. 3847. The testimony of these witnesses, and these documents are made a part of the record.

The application of the Railway Express Agency, Incorporated, is not for permission to file the power of attorney required by Sec. 4027 of the Code of Virginia; but is for a certificate of authority under Sec. 3847 of the Code of Virginia to do an intrastate express business in the State of Virginia. This is not only apparent from the application filed; but at the formal hearing held on this application, counsel for applicant, in reply to the question by the Chairman of the Commission, expressly stated that the application was for a certificate of authority to do business in Virginia under Sec. 3847, and not merely that the corporation be permitted to file the power of attorney provided for under Sec. 4027.

In addition to the documents introduced into the record by the applicant the Commission has made the following papers a part of the record:

Copies of letters dated June 9, 1914 and June 26, 1914, from the Chairman of the Commission to Chas. W. Stockton, Esq., General Counsel for Wells Fargo & Company, Express, written in the matter of the application of Wells Fargo & Company, Express, for a certificate of authority to do business in Virginia, which application was accompanied by papers and fees required for domestication of a foreign corporation, under Sec. 3847 of the Code;

Copy of certificate issued by the Clerk of the State Corporation Commission under date of June 29, 1914, showing refusal of the State Corporation Commission to accept fees tendered by Wells, Fargo & Company, Express, with its application for domestication, which is in the files of the Commission attached to said application; and

Certificate of R. T. Wilson, Clerk of the State Corpora- [fol. 218] tion Commission of Virginia that there is of record no certificate of authority to do business in Virginia issued to Wells Fargo & Company, Express, or order of the Commission directing the issuance thereof.

The nature of the business and the principal object and purpose for which the company is incorporated are set forth as follows in the certificate of incorporation:

"1. To engage in, conduct and carry on in the State of Delaware, and in and between any and all of the States of

the United States, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries as agent or otherwise, the express transportation business; and to handle, transport and forward by railroad, highway, water and air by means of such instrumentalities of transportation, carriage and conveyance as it may from time to time use, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and other movable personal property over and upon such lines and routes as may from time to time or at any time be established by it or with its approval, and in and between the points, communities and stations at which it may from time to time or at any time establish and continue agencies; and to acquire, have, possesses and exercise all the powers, privileges, rights and franchises necessary, appropriate or convenient for the aforesaid purposes, including all such as may be incident and proper for express carriers;" * * *

The certificate also contains the following clause under the head of objects and purposes:

"9. To organize or cause to be organized under the laws of the State of Delaware, or of any other state, district, territory, province or government, a corporation or corporations for the purpose of accomplishing any or all of the objects for which this corporation is organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound up, liquidated, merged or consolidated;"

Though in the Note of Argument filed by counsel for this company much stress is laid upon the fact that the Railway Express Agency, Incorporated, is simply an agency of the railroads themselves to conduct their own express business over their own lines or routes, and that the ownership of [fol. 219] shares of stock in the Railway Express Agency, Inc., is limited to railroad corporations, no such provisions are to be found in the charter of the company. There is, however, filed as a part of the record a form for agreement between the Railway Express Agency, Inc., and each railroad company over whose lines it operates. Sec. I, Art. II of this form provides in part as follows:

Art. II, "Sec. 1. The rail company hereby constitutes and appoints the express company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick up and delivery), upon such passenger, express or mail trains of the rail company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company."

This proposed form bears date of March 1, 1929. It does not affirmatively appear from the record that it has been actually executed by any railroad company or the Railway Express Agency, Inc.; but in the decision of this case the Commission assumes that the same has been executed by all class I railroads operating in Virginia, including the Louisville and Nashville Railroad Company which is a foreign corporation which has had lines extending across the boundary of Virginia since prior to 1902; and that such proposed agreement will be required of all railroads over whose lines the Railway Express Agency, Inc. operates.

Neither at the time the original application was made by the Railway Express Agency, Inc., on January 25, 1929, nor at the time it renewed its application on March 4, 1929, was this company doing any business in the State of Virginia, either interstate or intrastate.

It appears from the report of the Interstate Commerce Commissioner, Finance Docket 73221, filed in these proceedings by the applicant, that all the Class I Railroads operating in Virginia will be entitled to purchase one or more shares of stock in the Railway Express Agency, Inc.; but that none of the Virginia roads smaller than a Class I road will be entitled to become stockholders.

Railway Express Agency, Inc., was not incorporated until 1928; and, while it has acquired certain property of the American Railway Express Agency, which was incorporated [fol. 220] in 1918, and has acquired the right to operate over the lines of railroads in Virginia which were in existence in 1902, there is nothing in the record to show that the Railway Express Agency, Inc., is the corporate successor of any corporation existing in 1902, or that it has succeeded to

the corporate powers of any corporation existing in 1902.

Much of the oral testimony in the record is directed to the point that all railroads in Virginia over whose lines the Railway Express Agency, Inc., proposes to operate are either incorporated under the laws of the State of Virginia, or had lines extending across the boundary of the State of Virginia when the Constitution of 1902 became effective.

The evidence is far from conclusive on this point; but the Commission does not deem it necessary to pass upon this question at this time. It is clear from the record that the Railway Express Agency, Inc., did not have a line or route extending across the boundary of the Commonwealth when the present Constitution of Virginia became effective in 1902; and under the view entertained by the Commission it is material that a line or route which the Railway Express Agency, Inc., has now acquired or proposes to use, extended across the boundary when the Constitution went into effect in 1902.

No question of the right of Railway Express Agency, Inc., to do in Virginia an interstate express business is here involved. The State of Virginia has no power to prohibit a foreign corporation from entering the State of Virginia and doing therein a purely interstate business; and Railway Express Agency, Inc., has the unquestioned right, by virtue of the Interstate Commerce Clause of the Federal Constitution, to enter Virginia and do therein an interstate business without securing a certificate of authority so to do either from this Commission or any other State agency. (Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649). It has been consistently held by this Commission and the Courts of Virginia that Sec. 3447 of the Code has no application to a corporation doing a purely interstate business.

If the Railway Express Agency, Inc., upon compliance with the provisions of Sec. 3847 is not entitled to a certificate of authority to do an intrastate express business in Virginia it is because of the prohibition contained in Sec. 163 of the Constitution. Sec. 163 and Sec. 153 of the Constitution both are found in Art. XII. Sec. 153 expressly provides as follows:

[fol. 221] "The provisions of this article shall always be so restricted in their application as not to conflict with any

of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation has been herein expressed."

Therefore, by the mandate of the Constitution, Sec. 163 must be construed to apply only to intrastate business. The construction which has always been given by this Commission to Sec. 163 is that foreign public service corporations are only thereby prohibited from carrying on in Virginia any intrastate business and from exercising in Virginia any of their powers or functions as a public service corporation in intrastate service.

By Sec. 153 of the Constitution express companies are expressly declared to be public service corporations. It is, therefore, beyond question that the term, "Public Service Corporation" as used in Sec. 163 of the Constitution of Virginia includes express companies; and that doing an express business is the exercise of a public service function. Sec. 163 of the Constitution provides as follows:

"No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. *But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect;* but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such *is* it may own, lease, use or operate, when this Constitution goes into effect."

The first contention of the applicant is, that it is entitled to do an intrastate express business in Virginia because it

is a corporation which is excepted from the operation of the [fol. 222] provisions of Sec. 163 of the Constitution by the language in italics in above quotation from Sec. 163. Its contention is that the language, "extends across the boundary of this Commonwealth" does not mean, extends across the boundary of this Commonwealth, "at the time this Constitution goes into effect"; but is to be construed as if it read, "shall at the time this Constitution goes into effect, or at any time thereafter, extend across the boundary of this Commonwealth"; and that as it has recently (in 1928 or 1929) acquired the right to operate over routes and lines of railroads which extend across the boundary of the Commonwealth, Sec. 163 does not apply to it.

The Commission is of the opinion that this is not the true construction of Sec. 163. We think the true construction of Sec. 163 is that: "This section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth when this Constitution goes into effect." Only those foreign public service corporations are excepted from the prohibition of Sec. 163 whose line or route extended across the boundary of this Commonwealth at the time the Constitution of 1902 went into effect, or which were then engaged in doing a lawful business in the State of Virginia. The Railway Express Agency, Inc., falls in neither of these classes; and is, therefore, prohibited by Sec. 163 from doing in Virginia any intrastate express business, though it has the unquestioned right to do therein interstate express business.

The language, "whose line or route extends across the boundary of this Commonwealth" itself speaks as of the date the Constitution becomes effective. In addition to this, the clause, "when this Constitution goes into effect" modifies the clause, "any public service corporation whose line or route extends across the boundary of this Commonwealth," as well as the clause, "such lawful business as it may be engaged in within this State." We think that the language, context, punctuation, and the object which it is evident the framers of the Constitution sought to attain support the construction that the only foreign public service corporations excepted from the prohibitions of Sec. 163 are such as had lines or routes extending across the boundary

of Virginia when the Constitution went into effect in 1902 or were then doing in Virginia a lawful business.

In support of its contention that the clause, "when this Constitution goes into effect" was not intended to modify, [fol. 223] "whose line or route extends across the boundary of this Commonwealth," the applicant states in its brief that as Sec. 163 was originally reported from the Committee on Corporations to the Constitutional Convention there was a full stop, or period, after the words "across the boundary of the Commonwealth"; and that it was changed to a comma when later there was added the disjunctive proposition: "nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect"; (citing Debates Const. Conv., Vol. II, p. 2810 as authority for this statement). The learned counsel for the applicant has been mislead into this inaccuracy by the inaccuracy of the report of the Debates of the Constitutional Convention. As will be seen by reference to the Journal of the Constitutional Convention of 1901-02, the wording and punctuation of the above quoted excepting clause as originally reported to the Constitutional Convention from the Committee on Corporations was identical with its present wording and punctuation. As originally reported, the whole excepting language constitutes one sentence; there is a comma (not a period) after "Commonwealth"; and immediately following the comma, are the words "nor prevent any foreign corporation" etc. (See full text of section as originally reported hereinafter quoted.)

The applicant in its brief further insists that the excepting language quoted above, excepts two distinct classes of foreign corporations from the operation of the prohibitions of Sec. 163; (1) Public Service Corporations whose lines extend across the boundary of the State which are wholly excepted, and (2) All foreign corporations engaged in business in the State at the time the Constitution goes into effect, other than public service corporations, which are excepted only to a limited extent; and that when once it is ascertained that the lines of a public service corporation extends across the boundary of Virginia (whether at the time the Constitution went into effect or afterwards) nothing in Sec. 163 has any application thereto.

This was clearly not the construction placed upon this language by the Constitutional Convention, as is apparent from its action on the amendments offered to Sec. 163 on the floor of the Convention.

If the construction contended for by applicant be correct, then the section as originally reported, and as it now reads, absolutely excluded the Louisville and Nashville Railroad Co. from the operation of the whole of Sec. 163, even [fol. 224] though it was then doing business in the State of Virginia, for it was a foreign corporation whose line or route extended across the boundary of the Commonwealth at the time the Constitution went into effect in 1902. But the Constitutional Convention clearly construed the italicized language in the below quoted text of Sec. 163 as originally introduced to apply to the Louisville & Nashville R. R. Co., in spite of the fact (which was called to their attention) that the Louisville & Nashville R. R. Co. was a foreign corporation operating a line of railroad which then extended across the boundary of the State; and refused to modify Sec. 163 in behalf of the Louisville & Nashville R. R. Co. further than to make it clear that it might, by becoming incorporated in Virginia, be relieved of the inhibition thereof.

Section 12 of the report of the Committee on Corporations as originally reported to the Convention by Mr. Braxton, its chairman, which became Sec. 163 of the Constitution, read with line numbers, as follows:

"Sec. 12. No foreign corporation shall be authorized to carry on, in this State, the business, nor to exercise any of the powers or functions of a public service corporation, nor be permitted to do anything which domestic corporations are prohibited from doing, nor be relieved from compliance with any of the requirements made of domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such corporation. But this section shall not affect any public service Corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such business as it may be actually engaged in, within this State, when this Constitution goes into effect; but any

such foreign public service corporation, so engaged, shall not be authorized to hereafter acquire, lease, use or operate, within this State, any public or municipal franchise in addition to such as it may own, lease, use or operate when this Constitution goes into effect. The property within this State, of foreign corporations shall always be subject to attachment, the same as that of non-resident individuals." (See Journal and Documents of the Const. Conv., 1901-02, Report of the Committee on Corporations.)

When Sec. 12 of the Report of the Committee on Corpora- [fol. 225] tions was reported, Mr. Ayers introduced the following amendment:

"In line 18 after the word "effect", insert the following: "but this section shall not prevent any foreign railroad company, operating a railroad in this state, from building branch roads, not exceeding twenty miles in length, from any point or points on its present line as now authorized by law."

This amendment was defeated, ayes 22, noes 31.

(See Journal & Documents of the Const. Conv. of 1901-02, p. 430.)

When he introduced this amendment, Mr. Ayers stated that the purpose of the amendment was to meet the situation of the Louisville & Nashville Railroad Company, which was a foreign corporation. Mr. Braxton opposed the amendment. In reply to Mr. Braxton's opposition to the amendment, Mr. Ayers said:

"I think with you that no foreign corporation ought to be permitted now to build into the State under a foreign charter, but that it ought to obtain a domestic charter; but the roads that are now operating under foreign charters in the State ought to be permitted to exercise the same authority that you give to domestic corporations to build branch lines not exceeding twenty miles in length." (Debates Const. Conv., 1901-02, Vol. II, p. 2812.)

In speaking further in opposition to this amendment, Mr. Braxton, in reply to Mr. Ayers, says:

"Mr. President, I should like to say just one word more. The gentleman admits that the policy of this section is a

wise and proper policy for all other roads that hereafter may come into the State. If it is not right and proper, then we ought to throw it out; but if it is proper to provide that no other railroad shall build lines without becoming incorporated under the laws of this State, why should we except the Louisville and Nashville from it? If it is good for everybody else, why is it not good for them? * * * We have the right, and it is our duty, in the interest of the people of this state, irrespective of the Louisville and Nashville Railroad, to legislate along the line which the gentleman assumes is a wise one, to legislate along the lines which this [fol. 226] State has always legislated along for years, because it is the only road which ever came in under these circumstances." (Debates Const. Conv. 1901-20, Vol. II, p. 2831.)

Following the defeat of the amendment introduced by Mr. Ayers, the following amendment proposed by Mr. Braxton was adopted:

In line 18, add after the word "effect" the following: "Without first becoming incorporated under the laws of the State." (See Journal and Documents Const. Conv. 1901-02, p. 433.)

The Committee on Form seems to have changed the position of the words "without first becoming incorporated under the laws of the State of Virginia" to its present position.

It is, therefore, clear that the Constitutional Convention did not construe Sec. 163 as providing that the fact that a foreign public services corporation had lines extending across the boundaries of the Commonwealth lifted the corporation wholly out of the operation of all provisions of Sec. 163; but that, on the contrary, even though a foreign public service corporation in 1902 had a line or route extending across the boundary of the Commonwealth, the Convention construed the following language as applicable thereto:

"but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate, when this Constitution goes into effect."

These facts make all the more irresistible the conclusion that the plain intent of Sec. 163 is to prohibit any foreign public service corporation thereafter chartered from exercising any of its public service functions within the State of Virginia in doing an intrastate business.

With the possible exception of the case of the American Railway Express Company in 1918, to which reference is hereafter made, the construction herein given by the Commission to Sec. 163 appears to be the construction that has [fol. 227] been consistently given to this section by the State Corporation Commission of Virginia from 1902 to the present time.

The first case of which we have been able to find a record in which a foreign public service corporation which neither had a line nor route extending across the State line when the Constitution of 1902 went into effect, nor was doing business in Virginia at that time, applied for a certificate of authority to do business in Virginia, was the application of the Wells Fargo & Company, Express, in 1914. This company was a foreign corporation doing a general express business. It filed with this Commission in 1914 all the papers required by Sec. 3847 of the Code and tendered to it all the fees which a foreign corporation is required by statute to pay upon domestication in Virginia.

The sole question before the Commission in the Wells Fargo case was whether Sec. 163 of the Constitution prohibited the issuance of a certificate of authority to do an intrastate business in Virginia to a foreign public service corporation which was neither doing business in Virginia when the Constitution of 1902 went into effect nor had a line or route extending across the State boundary at that time. The Commission refused to grant to Wells Fargo & Company, Express, a certificate of authority to do business in Virginia under Sec. 3847. Its reasons for its refusal are stated in the two letters below quoted from the Chairman of the Commission to the General Counsel of Wells Fargo & Company, Express, dated -une 9, 1914 and June 26, 1914:

"June 9th, 1914. rrp-w.

Chas. W. Stockton, Esq., General Counsel Wells Fargo & Company Express, New York City.

My Dear Sir: Your letter of June 8th, addressed to the Clerk of this Commission, has been referred to me.

Replying thereto I would say that under the Virginia Constitution, Section 153, express companies are public service corporations, and under Section 163 foreign corporations are forbidden to exercise any of the powers or functions of public service corporations. So that it will be impossible for Wells Fargo & Company, Express, to conduct its business in this State. The only way by which it could be done [fol. 228] would be to organize a Virginia corporation, all of the stock of which could be held by Wells Fargo & Company, Express, the foreign corporation.

Very truly yours, —— ——, Chairman."

rrp—.

"June 26, 1914. rrp-w.

Chas. W. Stockton, Esq., General Counsel Wells Fargo & Company Express, New York City.

My Dear Sir: I have your letter of June 20th, enclosing brief with reference to the desire of Wells Fargo & Company to engage in intrastate express business in Virginia.

Replying thereto I would say that recognizing the force of your brief and the authority upon which you rely—Western Union Telegraph Company vs. Kansas, 216 U. S. 163, I write to say that as at present advised this Commission will take no step to prevent Wells Fargo & Company, Express, from taking over the business of the United States Express Company in this State on July 1st. It must not be understood, however, that this Commission conceded the right of the company to do any intrastate business whatever. It must be further understood that this Commission does not, either for its present or future membership, waive any legal right or authority to enforce any or all of the Virginia statutes which may be violated by Wells Fargo & Company, Express, in connection with such intrastate business as it proposes to do.

We note that there are some Virginia statutes to which you allude in your brief which you appear to concede the State's powers to enforce, and I presume that it is your purpose to comply with these statutes.

Very truly yours, —— ——, Chairman."

On July 26, 1918 the American Railway Express Company, a foreign corporation, was issued a certificate of authority to do business in Virginia under Sec. 3847 by this

[fol. 229] Commission. As appears from the records of the Commission this was a corporation which was chartered in 1918. It, therefore, could not have had a line or route extending across the boundary of the Commonwealth in 1902, nor have been doing business in the State at that time. There is no record of the reasons upon which the Commission acted in granting this certificate. However, it is a matter of common knowledge that at the time the American Railway Express Company was incorporated the Federal Government, on Jan. 1, 1918, had assumed control of all express companies; and was, on July 26, 1918, operating the American Railway Express Company as a Federal Agency through the Director General of Railroads. The Commission may well have taken the view that the State of Virginia had no power to withhold from such a Federal Agency, being so operated, a certificate of authority to do an intrastate business within this State; and it would appear that the certificate of the American Railway Express Company was issued upon some such view, for when in 1919 the Inland Navigation Company, a foreign public service corporation, made application to the Commissioner for a certificate of authority to do business in Virginia, the Commission refused the application and ruled:

"That the exceptions to the general rule set out in Section 163 related only to corporations engaged in business, or whose line or route extended across the boundary of the Commonwealth at the time 'when this Constitution goes into effect'." (See Memo, of Decision of Commission in the matter of Southeastern Express Company, filed by applicant as a part of the record in the matter of the pending application.)

When this same question again came before the Commission in 1921 in the matter of the application of the Southeastern Express Company for a certificate of authority to do business in Virginia, the Commission appears to have given to Section 163 the same construction which the Commission had given it in the Wells Fargo Case, and as is herein given to it by us.

The Southeastern Express Company, a foreign public service corporation, which had just been incorporated, had

secured the right to operate over the line of the Southern Railway Company and affiliated companies in Virginia and elsewhere, and it was used by the Southern Railway Company and its affiliated companies to render express service [fol. 230] over their lines. The relation which the Southeastern Express Company bore to the Southern Railway Company and its affiliated lines was, for all practical purposes, the same as that which the Railway Express Agency, Inc., (the applicant here) bears to the railroads over whose lines it proposed to operate in Virginia, except that all its capital stock was not owned by railroads over whose lines it operated.

The Commission issued to the Southeastern Express Co. a certificate of authority to do business in Virginia under Sec. 3847 of the Code. From its memorandum opinion filed in the Southeastern Express Co. case, the Commission appears (as we think erroneously) to have adopted the view of the Express Co., that in the light of the cases of Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. Ed. 708, and Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, Virginia cannot, by constitutional provision or otherwise, prohibit a foreign public service corporation, which under the protection of the Interstate Commerce Clause of the Federal Constitution has entered Virginia to engage in -state commerce, from then doing in Virginia also an intrastate business. But the Commission clearly appears to have entertained the view that the language of Sec. 163 excepts from the prohibitions thereof only such foreign express companies as had lines or rout-s extending across the boundary of the Commonwealth when the Constitution of 1902 went into effect.

In its opinion granting the certificate the Commission says (italics ours):

"The Commission adopted the construction contended for by counsel for the express company and hence decided:

"1. A foreign public service corporation engaged in interstate commerce may be licensed to transact business in this Commonwealth under the provisions of Sec. 3845 and 3847 of the Code *in spite of the provisions of Sec.* 163 *of the Constitution*". (See *Memorandum of Decision of Commis-*

sion, dated May 4, 1921, filed by applicant as a part of the record herein,)

With the exception of the certificates issued to the American Railway Express Company, and the Southeastern Express Company, we have been able to find no record of any other certificates of authority to do business in Virginia [fol. 231] under Sec. 3847, which have been issued to any foreign public service corporation, which at the time *to* Constitution of 1902 went into effect neither had a line or ro-te extending across the State line, nor was engaged in business in Virginia.

But the applicant insists that if Sec. 163 be construed to prohibit a foreign corporation which has entered Virginia to do an interstate business from then doing also an intrastate business in the State, then Sec. 163 is in contravention of the Interstate Commerce Clause of the Federal Constitution and void.

This is the same contention that was made by the Southeastern Express Company in 1921 (see ante), which the Commission at that time sustained, and in reliance upon which it appears to have granted to the Southeastern Express Company the certificate of authority to do business in Virginia under Sec. 3847, "in spite of the provisions of Sec. 163 of the Constitution." The authorities relied upon in support of this contention are now, as then, Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. Ed. 708; and Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649.

This, in effect, is the assertion of the proposition that by virtue of the Interstate Commerce Clause of the Federal Constitution no State can prohibit a foreign corporation which has entered the State vi et armis of the Federal Constitution for the purpose of doing an interstate business from then doing therein also an intrastate business.

The proposition is unsound on principle, subversive of the powers expressly reserved to the State under the Federal Constitution, and destructive of the power of the State to adequately regulate public service corporation doing intrastate business in Virginia; and, we think, it should not be sustained by this Commission unless it shall have been

plainly declared to be the law by the Supreme Court of Appeals of Virginia, or some Federal Court whose decisions are binding upon this Commission, in a case in which the question is so clearly in issue that any pronouncement with reference thereto is not dictum. We have been cited to no case decided by the Supreme Court of the United States or of any State which has so held. Certainly the two cases above cited as authority therefor do not so hold, even by way of dictum. The question of the power of a State to prohibit a foreign public service corporation from doing in a State an intrastate business because it has entered the State to do an interstate business, was not involved directly, or indirectly, in either cause; and the Su- [fol. 232] preme Court of the United States did not in these cases either pass upon or refer to such question.

In the Pensacola Case the only question involved was whether the State of Florida had the power to grant to the Pensacola Telegraph Company, a Florida corporation, the exclusive right to construct a telegraph line of any kind whatsoever through two counties of the State of Florida, to the exclusion of the Western Union Telegraph Company, a foreign corporation, engaged in interstate commerce, where the Western Union Telegraph Company had secured by contract with a railroad company having a right-of-way extending across these counties, the right to construct its telegraph lines on such right-of-way. The Court held that Florida could not prohibit the Western Union Telegraph Company from constructing a telegraph line in Florida where it did not have to make use of the power of condemnation to do so. But the question of whether Florida could prohibit the Western Union Telegraph Company from doing therein an intrastate business was in no way involved in the case, or referred to. In reaching its conclusion, the Court relies very strongly on the Act of Congress, approved July 24, 1866, entitled, "An Act to Aid in the Construction of Telegraph Lines, and to Secure for the Government the Use of the Same for Postal, Military, and Other Purposes", the effect of which is stated by the Court in the following language:

"It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect

the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads *shall prevent the occupation of post-roads* for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

"No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

In the case of Crutcher v. Kentucky (supra), the sole question involved was whether a statute of Kentucky which required a person who was an agent of a foreign express company, which Kentucky had admitted to the State to do both an interstate and intrastate business, to take out a license to [fol. 233] act as the agent of such company in the doing of any express business whatsoever was in violation of the Federal Constitution. The Court held that such a statute was in contravention of the Interstate Commerce Clause of the Federal Constitution and, therefore, invalid. But, there is nothing in the case touching upon the right of the State of Kentucky to have, in the first instance, prohibited this foreign express company from doing in Kentucky any intrastate business whatsoever. The Court, in its opinion says (italics ours):

"The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. *This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the State law.* And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes."

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States),

does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the Company. *But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization.* These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. *But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.*"

The case of Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, and Ludwig v. Western Union Teleg. Co., 216 U. S. 146, 54 L. Ed. 423, are clearly distinguishable from the case here before us. In both of these cases [fol. 234] the question was whether a State could exact from a foreign telegraph company a charter fee of a given per cent of its entire authorized capital stock, as a condition of continuing to do an intrastate business in a State. The Court held that the statutes of Kansas and Arkansas in question were void, saying in The Kansas Case (italics by the Court):

"Looking then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the marking of the payment by the telegraph company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the com-any's interstate business and on its property located or used outside of the state. * * * It strikes that the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a *condition* of the company telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent of its

whole authorized capital, representing all of its property and all its business and interests everywhere."

The Court in The Kansas Case expressly points out:

"That the telegraph company lawfully entered Kansas, with the consent of both the territory and State, for the purposes of its business of every kind, long before, and was legally there, when the Bush Act was passed" * * * and that the state concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded."

It is clear that in neither of the cases was the question even indirectly involved of the right of the State to have prohibited the entrance into the state of a foreign public service corporation for the purpose of doing therein intrastate business.

This contention of the applicant is at this time of serious importance to the State of Virginia in view of the many foreign corporations now engaged in the interstate trans- [fol. 235] portation of passengers and freight from, to, and across Virginia by motor vehicles operated over the public highways of the State. The Motor Vehicle Carrier Act of Virginia provides:

"Every motor vehicle carrier, as hereinbefore defined is hereby declared to be a common carrier, a transportation company and a public service corporation within the meaning of the laws of this State. * * * But no such motor vehicle carrier shall be deemed to possess the power of eminent domain." (Acts 1926, p. 921.)

In Buck v. Knykendall, 267 U. S. 307, 69 L. Ed. 623; Bush v. Maloy, 267 U. S. 317, 69 L. Ed. 627, the Supreme Court of the United States has held that a State is without power to prohibit a foreign motor vehicle carrier from entering the State and using its highways for the purpose of doing therein an interstate business. If this contention of the applicant is sound, a foreign corporation chartered to transport persons or property by motor vehicles over public highways can, by virtue of the Interstate Commerce Clause of the Federal Constitution, force its way into the State of Virginia for the purpose of doing therein over Virginia highways an interstate business; and having once entered

Virginia to do interstate transportation, can then demand that it be permitted to do also an intrastate business. The proposition is destructive of the power of Virginia to control and regulate the use of its State constructed highways for intrastate transportation by granting or refusing certificates of convenience and necessity for such transportation.

The applicant further contends that by the use of the future tense ("shall obtain" and "shall * * * execute") in Sec. I, Chapt. VIII, of An Act Concerning Public Service Corporations, approved Jan. 18, 1904, and in Sec. 4027 of the Code of 1919, the General Assemblies of 1902-3-4 and 1919 expressly provided that any foreign express company, which at any time may obtain from a Virginia railroad the right to transport express over its lines in Virginia, may do an intrastate express business in Virginia, even though such express company had no line or route extending across the boundary of Virginia when the Constitution went into effect in 1902; that, therefore, these General Assemblies have construed Sec. 163 of the Constitution as excepting all express companies from the prohibitions thereof, by which construction this Commission and the courts are now bound.

[fol. 236] In the light of the history of the provisions contained in Sec. I, Chapt. VIII, of the Act of Jan. 18, 1904 and Sec. 4027 of the Code of 1919, we think that no inferences can be drawn therefrom that the legislature has construed Sec. 153 of the Constitution as exempting from its prohibitions any foreign express companies other than those which had lines or routes extending across the boundary of the Commonwealth when the Constitution went into effect in 1902, or were then engaged in business in Virginia; and that the fact that the legislatures of 1902-3-4 and 1919 retained the future tense ("shall") when they re-enacted the provisions contained in thes- statutes is without significance as showing the construction placed upon Sec. 163 by these legislatures.

Sec. 1216 of the Code of 1887, which was in effect when the Constitution of 1902 was adopted, provided in part as follows:

"If any corporation, company, or association not incorporated by or formed in this State, or any person, not a resident thereof, shall obtain from a railroad company of

this Commonwealth the right or privilege to carry any articles on the trains of such railroad company, for the purpose of receiving compensation for the same, such corporation, company, association, or person, shall not be permitted to carry such articles on such trains, without having an agent in this State, as prescribed by Section 1266, and all the provisions of said Section, and of Section 1267, shall apply to such corporation, company, association, or person;"

The General Assembly of 1902-3-4 incorporated this language with a few minor changes in Sec. I of Chapt. VII, "Express and Express Companies", of "An Act Concerning Public Service Companies", approved Jan. 18, 1904.

The General Assembly of 1919 re-enacted this provision with only slight changes of language as Sec. 4027 of the Code of 1919, which reads as follows:

§4027. Foreign express companies.—Every corporation, company, or association not incorporated by or formed in this State, or any person or partnership not a resident thereof, which shall obtain from a railroad, steamship, or steamboat company of this Commonwealth the right or [fol. 237] privilege to carry any articles or things by or upon the trains, ships, or cars of such company for the purpose of receiving compensation for the same, shall, before being permitted to do any business in this State, execute the power of attorney required by section thirty-eight hundred and forty-five."

Prior to 1902 the Constitution of Virginia contained no prohibition against any foreign public service corporation doing business in Virginia. When the Constitution of 1902 became effective, and on Jan. 18, 1904, there were three foreign express companies which had lines or routes extending across the boundary of Virginia and were doing business therein; Adams Express Company, Southern Express Company, and United States Express Company. All three of these companies continued to do business in Virginia certainly as late as 1918, and certainly one of them, if not all of them, retain its corporate existence and potential power to do a general express business in 1929. (See Journal of

Board of Public Works, Vol. P., p. 356, p. 456. Reports of State Corporation Commission of Va., 1903, p. 1195-1197, and 1904, p. 1537-1539; and Report State Corporation Commission of Va. 1918, p. 299-302).

These three companies were clearly not prohibited from continuing to do intrastate business in Virginia by Sec. 163 of the Constitution. Prior to 1902 they had been required by Sec. 1216, Code 1887, to appoint an agent or attorney and to make a deposit with the State Treasurer for the protection of citizens and residents of the State of Virginia. Sec. 1216 of the Code of 1887 was repealed by the Act Concerning Public Service Corporations of Jan. 18, 1904; and had the provisions of Sec. 1216, requiring the appointment of an agent and the making of a deposit not been re-enacted, these companies would thereafter have been exempted from these provisions. The object of Sec. I, Chap. VIII, of "An Act Concerning Public Service Corporations", approved Jan. 18, 1902, was to re-enact and continue in effect the provisions of Sec. 1216 of the Code of 1887 as to such foreign express companies as were permitted under Sec. 163 of the Constitution to continue to do business in the State.

In 1919 neither the revision of the Code nor the legislature was chargeable as a matter of law with the knowledge that these foreign express companies which had lines or routes extending across the boundary of the State in 1902 had withdrawn from the State never to return thereto; and [fol. 238] they very properly retained these provisions of old Sec. 1216 of the Code of 1887 in the Code of 1919 as Sections 4027 and 4028 in order to continue to impose these requirements on these foreign express companies and any others permitted to exercise their public service functions in Virginia, should they continue to do an intrastate business in Virginia.

The applicant also contends that, even if the Railway Express Agency, Inc., when considered as a separate corporate entity is prohibited by Sec. 163 of the Constitution from doing in Virginia an intrastate business, yet this Commission should look behind its corporate entity and issue to it a certificate of authority to do an intrastate business in Virginia: because the capital stock of Railway Express

Company, Inc., is owned by railroads over whose lines it operates, some of which are companies which in 1902 had lines extending across the boundary of Virginia, and "is merely an agency by which practically the railroads carry on their own express transportation over their own lines". In other words that the certificate should, as a matter of law, be deemed to be issued to the stockholders of the Railway Express Agency, Inc., though in fact issued to the Railway Express Agency, Inc.

If this be true, in issuing to Railway Express Agency, Inc., a certificate of authority to do an intrastate business in Virginia, the Commission will be issuing a certificate of authority to do an intrastate business in Virginia to a large number of foreign railroad corporations which hold stock in the Railway Express Agency, Inc., which have not now, and have never had, a line or route extending across the boundary of the Commonwealth, among them, the New York Central R. R. Co., owning 144 shares, the Illinois Central R. R. Co. owning 29 shares, and the Erie Railroad Co., owning 25 shares. These railroad companies are clearly prohibited by Sec. 163 of the Constitution from doing an intrastate business in Virginia; and hence if the issuance of a certificate to Railway Express Agency, Inc., is in law and fact the issuance of a certificate to its stockholders, Sec. 163 prohibits the granting of such certificate.

The suggestion that the public service functions which the Railway Express Agency, Inc., proposes to exercise in doing an intrastate business in Virginia are to be exercised by the railroad companies doing business in Virginia, is not well considered. The Railway Express Agency, Inc., as a corporate entity is to conduct its express business interstate [fol. 239] and intrastate. There are 1,000 shares of stock of Railway Express Agency, Inc., to be outstanding, of which only 250 shares are to be owned by railroads which can, in any sense, be said to be now operating within the State of Virginia, to-wit:

Pennsylvania Railroad Company	126	shares
Baltimore and Ohio R. R. Co.	39	"
Louisville and Nashville R. R. Co.	20	"
Atlantic Coast Line R. R. Co.	20	"
Seaboard Air Line Ry. Co.	16	"

Chesapeake and Ohio Ry. Co.	10	shares
Norfolk and Western Ry. Co.	9	"
Richmond, Fredericksburg and Potomac R. R. Co.	7	"
Norfolk Southern R. R. Co.	1	"
Virginian Ry. Co.	1	"
Clinchfield R. R. Co.	1	"

Hence, it is clear that the control of the Virginia intrastate express operations of the Railway Express Agency, Inc., over Virginia railroads will not be vested in the railroad companies now operating in Virginia, which own only one-fourth of its stock, but by foreign public service corporations, prohibited by Sec. 163 of the Constitution from doing an intrastate business in Virginia, which own three-fourths of the stock of Railway Express Agency, Inc.

But even were all the stock in the Railway Express Agency, Inc., owned by railroads which were either incorporated in Virginia or had lines extending across the boundary of the Commonwealth when the Constitution went into effect, we think that this position of the applicant should not be sustained; for there is no such identity between the Railway Express Agency, Inc., and its several stockholders as would warrant this Commission in disregarding the legal entity of the Railway Express Agency, Inc., in the matter of issuing to it a certificate of authority to do an intrastate business in Virginia.

There is another argument made by the applicant in support of its contention that it is not prohibited by Sec. 163 of the Constitution of Virginia from doing therein an intrastate business which requires notice. The applicant seems to argue that Sec. 163 of the Constitution has no application to any foreign public service corporation which does not require the power of eminent domain to procure its line [fol. 240] or route across the boundary of the State; and that, therefore, Sec. 163 is not applicable to foreign express companies, because they can, and do, acquire their routes across the boundary of the State without having to resort to condemnation. But there is nothing in the language of Sec. 163 which warrants the limitation of the prohibitions

therein contained to such foreign public service corporations as require the use of the power of eminent domain to construct their lines. The prohibitions of Sec. 163 are not against the exercise of the power of eminent domain in Virginia by a foreign public service corporation in the construction of its route or line, but against the exercise by a foreign corporation of any of the powers or functions of a public service corporation in intrastate business in Virginia.

Counsel for applicant seems to assume that under the construction herein given to Sec. 163 by the Commission, so long as the Railway Express Agency, Inc., does the interstate express business in Virginia, the intrastate express business in Virginia must be carried on by a separate corporation. This need not be so. The Railway Express Agency, Inc., though incorporated under the laws of Delaware, may do an intrastate express business in Virginia by also becoming incorporated in Virginia, which may be accomplished in a very simple manner.

Railway Express Agency, Inc. may cause a corporation to be incorporated under the laws of Virginia to do a general express business; and then merge the Railway Express Agency, Inc., with the Virginia Corporation under Sections 2821-2827 of the Code of Virginia.

Upon the merger, Railway Express Agency, Inc., will become a corporation incorporated both under the laws of Delaware and of Virginia and will not then be prohibited by Section 163 of the Constitution from doing an intrastate business in the State of Virginia.

The certificate of incorporation of the Railway Express Agency, Inc., in Par. 9 of the third subdivision (heretofore quoted in full) expressly provides for such procedure by authorizing it to "organize or cause to be organized under the laws of the State of Delaware, or of any other State * * * a corporation for the purpose of accomplishing any or all of the objects for which this corporation is organized and to * * * merge or consolidate any such corporation or corporations."

There are numerous instances in which foreign railroad corporations have been merged with railroad companies [fol. 241] chartered under the laws of Virginia and thereby becoming corporations of both States; and there is no

great difficulty in the Railway Express Agency, Inc., becoming a Virginia corporation by merging into itself the Virginia corporation. Sec. 3857 provides another way in which, under certain circumstances, a foreign railroad corporation may become a Virginia corporation; but this has application only to railroad corporations, and with few exceptions the railroad corporations which are corporations both of Virginia and of other States have so become by merger with other corporations.

For the reasons herein stated, an order will enter denying the application of Railway Express Agency, Inc., for a certificate of authority under Sec. 3847 of the Code of Va. to do in intrastate business in Virginia, without prejudice, however, to its right under the Interstate Commerce Clause of the Constitution of the United States to engage in interstate commerce in Virginia without having received a certificate of authority to do business in Virginia under Sec. 3847 of the Code.

BEFORE STATE CORPORATION COMMISSION OF VIRGINIA

CHAIRMAN'S CERTIFICATE

The Chairman of the State Corporation Commission, under the seal of the Commission, doth hereby certify that the foregoing are all the facts upon which the action appealed from was based which are essential for the proper decision of the appeal, and all the evidence introduced before the Commission upon the hearing of this cause, to which is appended the opinion written by Epes, Chairman, stating the reasons upon which the action of the Commission appealed from was based, which opinion is adopted by the Commission and certified as and for the written statement of the reasons upon which the action appealed from was based, which is required by Sec. 156 of the Constitution of Virginia.

Witness the seal of the State Corporation Commission and the signature of its Chairman, attested by the Clerk, this 8th day of May, 1929, and in the 153rd year of the Commonwealth.

Louis S. Epes, Chairman State Corporation Commission of Virginia. (Seal of Corporation Commission.)

[fol. 242] Attest: R. T. Wilson, Clerk of the Commission.

BEFORE STATE CORPORATION COMMISSION OF VIRGINIA

CLERK'S CERTIFICATE

I, R. T. Wilson, Clerk, State Corporation Commission, do hereby certify that proper notice was given of the intention to apply for a transcript of the record in this case as the basis for appeal to the Supreme Court of Appeals of Virginia, pursuant to the provisions of Section 6339, Code of Virginia, 1919.

Given under my hand, at Richmond, this 7th day of May, A. D. 1929.

R. T. Wilson, Clerk State Corporation Commission.

A copy. Teste: H. Stewart Jones, C. C.

[fols. 243 & 244] Minute entries of argument and submission September 10 and September 11, 1929, omitted in printing.

[fol. 245] IN SUPREME COURT OF APPEALS OF VIRGINIA

RAILWAY EXPRESS AGENCY, INC.,

v.

COMMONWEALTH ex Rel. STATE CORPORATION COMMISSION

OPINION BY JUSTICE PRESTON W. CAMPBELL—November 14, 1929

This is an appeal from an order of the Corporation Commission denying the plaintiff in error, a foreign corporation, a certificate of authority to engage in intrastate express business in this State. Pursuant to section 156 of the Constitution, the facts are certified by the Chairman of the Corporation Commission.

Plaintiff in error is a corporation chartered under the laws of the State of Delaware. Under its certificate of incorporation, plaintiff is not only empowered to engage in interstate, intrastate and international express business, but to own, construct, purchase, lease, or otherwise acquire,

and to use, equip, repair, supply and maintain railway cars, rolling stock and machinery of all kinds, wagons, trucks, motor vehicles, air planes and all other means and instrumentalities, ice houses, ice factories, refrigerating plants, warehouses and storage plants, garages, stables, hangars, etc.; to buy and hold personal property of every character and description "without restriction or limit as to [fol. 246] amount;" to acquire and dispose of real property without limitation as to location or jurisdiction; to engage in manufacturing business and to acquire and develop manufacturing plants; to acquire and deal in copyrights, trade marks, patent rights, patent processes, etc.; to acquire and hold for investment or otherwise the shares of the capital stock or bonds, etc., of any corporation or corporations wherever organized, and also the bonds of the United States, or of any State in its political subdivisions. It is further authorized to organize subsidiary corporations to accomplish the purpose or objects for which it was incorporated; to loan money and to carry on any other lawful business "whatsoever which may seem to the Board of Directors of this corporation appropriate to be carried on in connection with the above purposes or calculated directly or indirectly to promote the interest of this corporation or enhance the value of its properties."

It is then provided: "The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation."

No question of the right of plaintiff in error to do an interstate express business in this State is involved in this [fol. 247] appeal. Under the plain provisions of the Interstate Commerce Clause of the Federal Constitution, the State has no power to prohibit plaintiff from engaging in interstate commerce. The refusal of the Corporation Commission to grant the certificate of authority applied for is based solely on the alleged prohibition contained in section 163 of the State Constitution, which reads as follows:

"No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are pro-

hibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of [fol. 248] this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate, when this Constitution goes into effect."

It is the contention of the plaintiff in error that while it is a corporation chartered by the State of Delaware, it is in fact a joint facility of the railroads now doing a freight business in the State, and that this being true, a certificate of authority to it to do an express business would be merely granting authority to those railroads doing business in the State which come within the provisions of section 163.

It appears from the statement of facts certified by the commission pursuant to the provisions of section 156 of the Constitution, that plaintiff in error received its charter in 1928, and while it has acquired certain rights and property of the American Railway Express Agency which was incorporated in 1918, and has acquired by agreement the right to operate over designated lines of railroads in Virginia which were in existence in 1902 when the Constitution became effective, it does not appear that plaintiff in error is the corporate successor of any of those railroads whose [fol. 249] line or route extended across the boundary of the Commonwealth in 1902.

The fact that plaintiff in error did not have a line or route extending across the boundary of the State when the Constitution became effective is conclusive that it must come within the provisions of section 163, as a corporate successor of those corporations operating under that sec-

used in section 163, to mean "business," then the facts are against the contention of plaintiff in error.

The word "corporation" as employed in the Constitution, is employed in a technical sense and does not fall within the general classification of the term "business." In order to become the corporate successor of the railroads, plaintiff in error must "stand in the shoes" of those corporations, and while accepting the benefits as such successor, it must also bear the burdens imposed by the State statutes.

Plaintiff in error, in our view, is a separate and distinct corporation from the agreeing railroad companies. Under the broad scope of the delegated powers contained in its certificate of incorporation, if once it should gain the priv- [fol. 250] ilege of doing an express business, without incorporating under the State law, it, under its charter, is empowered to engage in the sale of real and personal property, to "engage in any kind of manufacturing business," to acquire and sell mortgages, stocks and bonds, to acquire and deal in copyrights, trade marks, patent rights and to loan money. Such powers are not consonant with the powers generally accorded to common carriers of either interstate or intrastate commerce, and the exercise by the plaintiff in error of such powers under the guise of engaging in the express business as an agency of the railway companies, without being amenable to the statutes regulating similar corporations, would afford it an unwarrantable advantage.

It is a further contention of plaintiff in error that in any event it is entitled to a certificate of authority to do an intrastate express business because it is a corporation which has recently acquired the right to operate over lines and routes of railroads which extend across the boundary of the Commonwealth, and, therefore, is excepted from the operation of the provisions of section 163 of the Constitution, by virtue of this language: "But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent [fol. 251] any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, *when this Constitution goes into effect* * * *." (Italics added.) The basis of the contention is that the language "extends across the boundary of this Common-

wealth" does not mean "extends across the boundary of this Commonwealth at the time this Constitution goes into effect," but is to be construed as if it read, "shall at the time this Constitution goes into effect, or at any time thereafter, extend across the boundary of this Commonwealth."

In an able opinion, delivered by Chairman Epes, the commission answers this contention and gives to section 163 of the Constitution this construction:

"We think the true construction of section 163 is that 'This section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth when this Constitution goes into effect.' Only those foreign public corporations are excepted from the prohibition of section 163 whose line or route extended across the boundary of this Commonwealth at the time the Constitution of 1902 went into effect, or which were then engaged in doing a lawful business in the State of Virginia. The Railway Express Agency, Inc., falls in neither of these [fol. 252] classes, and is, therefore, prohibited by section 163 from doing in Virginia any intrastate express business, though it has the unquestioned right to do therein interstate express business.

"The language, 'whose line or route extends across the boundary of this Commonwealth' itself speaks as of the date the Constitution becomes effective. In addition to this, the clause, 'when this Constitution goes into effect' modifies the clause, 'any public service corporation whose line or route extends across the boundary of this Commonwealth,' as well as the clause, 'such lawful business as it may be engaged in within this State.' We think that the language, context, punctuation, and the object which it is evident the framers of the Constitution sought to attain support the construction that the only foreign public service corporations excepted from the prohibitions of section 163 are such as had lines or routes extending across the boundary of Virginia when the Constitution went into effect in 1902 or were then doing in Virginia a lawful business."

We are in accord with the Commission's construction of section 163. This, as we conceive it from an examination

of the journal, was in effect the construction of Hon. A. Caperton Braxton, a learned lawyer, a member of the Constitutional Convention and author of the provision involved. [fol. 253] Our position that section 163 has been correctly construed is strongly fortified by a construction of it by Chief Justice Prentis, who in the year 1914, as chairman of the Corporation Commission, similarly construed this section.

In 1914, Wells Fargo & Company, Express, a foreign corporation which neither had a line nor route extending across the boundary of the Commonwealth, applied to the commission for a certificate of authority to engage in intrastate express business. Though the company complied in all respects with the provisions of section 3847 of the Code of Virginia, a certificate of authority to do an intrastate express business in the State, without first securing a charter of incorporation, was denied. The reasons for the refusal are stated in the following letters:

"June 9, 1914.

"Chas. W. Stockton, Esq., General Counsel Wells Fargo & Company Express, New York City.

"My Dear Sir: Your letter of June 8th, addressed to the Clerk of this Commission, has been referred to me.

"Replying thereto I would say that under the Virginia [fol. 254] Constitution, section 153, express companies are public service corporations, and under section 163 foreign corporations are forbidden to exercise any of the powers or functions of public service corporations. So that it will be impossible for Wells Fargo & Company, Express, to conduct its business in this State. The only way by which it could be done would be to organize a Virginia corporation, all of the stock of which could be held by Wells Fargo & Company, Express, the foreign corporation.

"Very truly yours, —— ——, Chairman."

"June 26, 1914.

"Chas. W. Stockton, Esq., General Counsel Wells Fargo & Company Express, New York City.

"My Dear Sir: I have your letter of June 20th, enclosing brief with reference to the desire of Wells Fargo &

Company to engage in intrastate express business in Virginia.

"Replying thereto I would say that recognizing the force of your brief and the authority upon which you rely—Western Union Telegraph Company v. Kanas, 216 U. S. 163,—I write to say that as at present advised this Com- [fol. 255] mission will take no step to prevent Wells Fargo & Company, Express, from taking over the business of the United States Express Company in this State on July 1st. It must not be understood, however, that this Commission concedes the right of the company to do any intrastate business whatever. It must be further understood that this Commission does not, either for its present or future membership, waive any legal right or authority to enforce any or all of the Virginia statutes which may be violated by Wells Fargo & Company, Express, in connection with such intrastate business as it proposes to do.

"We note that there are some Virginia statutes to which you allude in your brief which you appear to concede the State's power to enforce, and I presume it is your purpose to comply with these statutes.

"Very truly yours, —— ——, Chairman."

With but two exceptions (when in our opinion the commission erroneously granted certificates of authority), this construction has been consistently followed.

Plaintiff in error further contends that when chapter 158 [fol. 256] of the Code of 1919 is looked to, its right to operate in this State without domesticating is clear, and that a refusal to permit such operation is to declare unconstitutional this chapter of the Code.

We do not think chapter 158 of the Code is involved in this appeal, and therefore do not deem it necessary to discuss it.

It is finally contended that to refuse to permit plaintiff in error to engage in intrastate business over the lines of railroad specified would be in violation of the Fourteenth Amendment to the Federal Constitution, for the reason that it would be a denial of that equal protection of the law guaranteed by the Federal Constitution.

The effect of the refusal of the State Corporation Commission to grant to the Express Company a certificate of

authority to do an intrastate business in the Commonwealth is but putting into execution the statutory regulations applicable to all foreign corporations which seek to enter the State and engage in competition with domestic corporations engaged in a similar business. There is no effort to deny to plaintiff that right guaranteed both by the State and Federal Constitutions to engage in interstate commerce. It is the policy of this State to open wide its doors [fol. 257] that capital may find a secure investment in industries under the protection of its laws; but the law is well settled that the entrance into the State by a foreign corporation for the purpose of doing business therein, is not an arbitrary right. The State, under the powers expressly reserved under the Federal Constitution, has the power to impose conditions. The only condition here imposed is that the foreign corporation must stand, not above, but on a parity with those domestic corporations which pay taxes to the State for the protection afforded them, and are willing to submit themselves to the jurisdiction of its courts.

In Hemphill v. Orloff, 277 U. S. 537, 72 L. Ed. 978, it is said:

"It is settled doctrine that a corporation organized under the laws of one State may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by section 2, article 4, of the Constitution."

In Ashley v. Ryan, 153 U. S. 436, several railroad corporations existing under the laws of separate States consolidated into one corporation. The statute of Ohio in which such consolidated corporation operated in part [fol. 258] imposed a charge upon the consolidated company of a percentage of its authorized stock as the fee of the State for the filing of the articles of consolidation in the office of the Secretary of State of Ohio, without which filing it could not possess the powers, immunities and privileges which appertain to a corporation in that State. It was contended that this fee was a tax on interstate commerce, the consolidated carrier being engaged therein, or a tax on the right to carry on same, or on the instru-

ments thereof. In denying this contention, the Supreme Court said:

"The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382 and 3384b, amended by act of April 11, 1890, 87 Ohio Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities and powers which it could by no means possess, save by the grace and favor of the [fol. 259] Constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say voluntary assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or [fol. 260] right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.

"That the right to be a State corporation depends solely upon the grace of the State, and is not a right inherent in the parties is settled."

In Pembina Con. Silver Mining &c. Co. v. Pennsylvania, 125 U. S. 189, the court said:

"The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within its jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states, may, therefore, require for the [fol. 261] admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. * * *

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."

No insurmountable obstacle stands in the way of plaintiff in error, if it desires to do intrastate business in this State. It may organize a corporation under the laws of the Commonwealth to do intrastate business, and if it desires to do so then merge with such domestic corporations under the provisions of sections 3821-3827 of the Code of Virginia.

The order of the commission is affirmed.

Affirmed.

[fol. 262] In Supreme Court of Appeals of Virginia

Railway Express Agency, Incorporated, Appellant,

against

Commonwealth of Virginia at the Relation of the State Corporation Commission, Appellee

Upon an Appeal from the State Corporation Commission Entered on the 8th Day of April, 1929

Judgment—Nov. 14, 1929

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session this day came here the parties by counsel, and the court having maturely considered the transcript of record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the said order be affirmed, and that the appellee recover of the appellant her costs by her expended about her defense herein, and also thirty dollars damages.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said State Corporation Commission.

Appellee's cost at Richmond, $1.77.

A copy. Teste: H. Stewart Jones, C. C.

[fols. 263-282] Petition for rehearing covering 20 pages omitted from this print. It was denied and nothing more by order Jan. 10, 1930.

[fol. 283] Minute entry of submission January 7, 1930, omitted in printing.

[fol. 284] In Supreme Court of Appeals of Virginia

[Title omitted]

Order Denying Rehearing—Jan. 10, 1930

On mature consider*ed*- of the petition of the appellant to set aside the order entered herein on the 14th day of November, 1929, and grant a rehearing thereof, the prayer of said petition is denied.

A copy. Teste: H. Stewart Jones, C. C.

[fol. 285] In Supreme Court of Appeals of Virginia

[Title omitted]

Petition for Appeal

To the Honorable R. R. Prentis, Chief Justice of the Supreme Court of Appeals of Virginia:

Now comes the Railway Express Agency, Incorporated, a corporation of the State of Delaware, having its principal office in the City of Wilmington in that State, Appellant in the above styled cause, and represents that on the 10th day of January, 1930 a final judgment was duly entered in the above styled cause on its petition for rehearing by the Supreme Court of Appeals of Virginia, the highest court in which a decision in the above styled suit could be had, affirming the order or judgment entered by the State Corporation Commission of the State of Virginia on the application of Appellant for a certificate of authority to do an express transportation business, both state and interstate, in the State of Virginia. The State Corporation Commission had on April 8, 1929 refused a certificate of authority to Appellant to do an intrastate express business in Virginia; without prejudice however to the right of the Railway Express Agency, Incorporated to engage in interstate commerce in Virginia without having received such certificate of authority.

This order was entered by the Commission notwithstanding the admitted fact that all formalities required by law

[fol. 286] applicable to the granting of a certificate of authority to do business in this State had been complied with by said Agency.

As shown by the accompanying record, Appellant had been incorporated under the laws of the State of Delaware with authority to engage in the transportation of property by express in and between any and all of the States of the United States, the District of Columbia, Cuba, Hawaii, Canada and Mexico. It did not seek to enter the State of Virginia to transact a new business, but had succeeded to and was and is now conducting a business which has been carried on in the State of Virginia for upwards of fifty years. It is the successor of the American Railway Express Company, also a corporation of the State of Delaware, which in 1918 was granted a certificate by the State Corporation Commission of Virginia to do an intrastate as well as interstate business in that State; it has assumed all of that company's liabilities and has purchased all its property, real and personal, its office and equipment, its wagons and trucks and all its supplies and has taken over its entire organization, and is transporting goods at the same rates and subject to the same classification and tariffs previously in effect.

Besides, the ownership of the shares of stock of your Petitioner is limited to the railroad corporations participating in its organization (record, page —) and Appellant is simply a joint agency of said railroads, including those operating in and across the State of Virginia, and is to serve as their joint agency in conducting the express business in their behalf, thus providing a service which the railroad companies have not only the right but are under the legal obligation to furnish either directly or through an agent.

[fol. 287] Accordingly, on January 25, 1929, a few weeks after its incorporation, the Railway Express Agency, Incorporated applied informally for a certificate of authority to do business in Virginia as a foreign express company under sections 3845 and 3847 of the Code of 1919 and chapter 158 of said Code entitled "Express Companies". Its application was refused and on March 4, 1929 it was formally renewed before said State Corporation Commission and evidence taken on its right to be granted such cer-

tificate. The refusal of the State Corporation Commission to grant said certificate of authority, at least so far as its right to do intrastate business in said State and the judgment of the Supreme Court of Appeals of Virginia affirming said refusal, was based solely on the alleged prohibition contained in section 163 of the State Constitution adopted in 1902 and which will be found in the Code of 1919 at page XCI. Section 163 reads as follows:

"No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

It was held that any foreign corporation not engaged in [fol. 288] business at the time the Constitution of 1902 went into effect and which thereafter sought to exercise the powers of a public service corporation could not exercise such powers in the State of Virginia, unless it was first incorporated under the laws of the State of Virginia and became a domestic corporation of said State. Hence, the right of Appellant to do an intrastate business was refused unless it should become a corporation of the State of Virginia and, upon appeal, this view of section 163 of the Constitution of Virginia was sustained by the highest court of

that State, and it was held that as a condition precedent to the right to do such intrastate business, the Railway Express Agency must secure a charter of incorporation under the laws of Virginia.

The State Corporation Commission, as well as the Supreme Court of Appeals of Virginia, further suggested that the Railway Express Agency, Incorporated might organize a corporation under the laws of the Commonwealth to do intrastate business and if it desired to do so then merge with such domestic corporation under the provisions of sections 3821-3827 of the Code of Virginia 1924. But this suggestion would still deprive Appellant of the equal protection of the law; nor would it lessen or remove the burden upon its interstate commerce. The corporation would then be a domestic corporation of the States of Delaware and Virginia and both its intrastate and interstate business would be subject to the laws of those states applicable to corporations organized therein.

Your petitioner contended both before the State Corporation Commission (record, page —) and the Supreme Court of Appeals of Virginia that it was lawfully entitled under the above named sections of the Virginia Code of 1919 to a certificate to do an express transportation business, both intrastate and interstate, in the State of Virginia and that section 163 of the Constitution of Virginia as thus construed [fol. 289] was void and unconstitutional for the reasons:

First. That it is in conflict with the Constitution of the United States guaranteeing to citizens the equal protection of the law, in depriving Appellant of its right to institute suits in the Federal courts and to remove suits from the state to the Federal courts on the ground of diversity of citizenship; and

Second. That it is repugnant to the Commerce Clause of the Constitution of the United States, and the enforcement of the Virginia Constitutional provision wholly excluding Appellant from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce.

Your petitioner further avers that all the foregoing questions were presented to and argued before the Supreme

Court of Appeals of Virginia, but that Court overruled the same and entered judgment sustaining the refusal of the State Corporation Commission to grant a certificate to do business in the State of Virginia to the Railway Express Agency at least so far as intrastate business was concerned and required that it incorporate under the laws of the State of Virginia; that said judgment and decision were and are erroneous and repugnant to the Constitution of the United States as will more fully appear from the assignment of errors which is filed herewith; and that said cause is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, your petitioner prays that an appeal from the Supreme Court of the United States may issue in this case to the Supreme Court of Appeals of Virginia for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated by the Clerk of the Supreme Court of Appeals [fol. 290] of Virginia may be sent to the Supreme Court of the United States as provided by law.

Dated the 28th day of January, 1930.

Wyndham R. Meredith, Attorney for Petitioner and Appellant.

[fol. 291] In Supreme Court of Appeals of Virginia

[Title omitted]

Assignment of Errors

Now comes the Railway Express Agency, Incorporated, petitioner and appellant, by Wyndham R. Meredith, its attorney, and in connection with its petition for an appeal shows that in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of Appeals in the above entitled cause manifest error has intervened to the prejudice of this petitioner and appellant in this, to-wit:

First. The court erred in holding that the petitioner and appellant could only engage in intrastate business upon condition that it became a domestic corporation, subject to

the jurisdiction of the State Courts. Such a requirement is clearly violative of the Constitution of the United States for the following reasons:

1. Because the decision is in conflict with the Constitution of the United States guaranteeing to citizens the equal protection of the law in depriving appellant of its right to institute suits in Federal courts and to remove suits from the State to the Federal courts on the ground of diversity of citizenship. The power of the State to exclude foreign corporations from doing business therein is subject to the important qualification that the State may not exact as a condition of the corporations engaging in business within [fol. 292] its limits that its rights secured to it by the Constitution of the United States may be infringed. This cannot be done directly or indirectly. Such action, whether legislative, or executive, or judicial, necessarily is calculated to curtail the full exercise of its right to institute in or remove to the Federal courts suits brought by or against it on the ground of diversity of citizenship. It is, therefore, void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all other of its sovereign powers, is subject to the limitations of the supreme fundamental law. The decision that accomplishes this result by requiring the Railway Express Agency, Incorporated to organize as a domestic corporation for the transaction of its intrastate business makes section 163 of the Constitution of Virginia unconstitutional and void.

2. This is because the Virginia constitutional provision so construed accomplishes indirectly that which the Supreme Court of the United States has specifically held may not be done directly and this it may not do. The State Constitution may now lawfully deprive the appellant of its constitutional right to resort to the Federal courts and it may not do so directly or indirectly. It cannot say to such foreign corporation you may engage in local business, only if you become a Virginia corporation. Such a condition is void and such is the condition prescribed in the decision in this instant case by the construction put upon the language of section 163 of the Constitution of Virginia of 1902. Such a surrender of the right to institute in or to remove to the Federal courts suits brought by or against it must be held to be void.

3. A corporation by seeking or obtaining permission to [fol. 293] do business in the State does not thereby become bound to comply with nor is it estopped from objecting to the enforcement of such enactments that conflict with the Constitution of the United States.

The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution.

Second. The decision of the Court is repugnant to the Commerce Clause of the United States.

1. Where the right to do an interstate commerce business exists without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the Commerce Clause of the Federal Constitution.

2. The power of the state is not absolute but is merely relative. Not only the right of regulation but likewise the right to exclude must be exerted conformably to the requirements of the Constitution of the United States; that is in such a manner as not either directly by the expression of a condition or indirectly by its non-expression to deprive the foreign corporation of rights secured to it by that instrument.

Third. The Supreme Court of Appeals of Virginia in enforcing section 163 of the Constitution of Virginia erred because to wholly exclude the Railway Express Agency, Incorporated from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce. It would necessitate the incorporation of appellant in Virginia or the conduct of its intrastate Virginia express business by a separate corporation with additional property, real and personal, equipment, wagons, trucks, supplies and stationery, offices and employees, and a separation of the interstate from the intrastate business, a task which on [fol. 294] its face is impracticable. The express business for the year 1928 produced gross receipts for the entire United States of upwards $285,000,000.00; for the State of

Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business and $641,949.86 intrastate business; that is the interstate Virginia business being 88 per cent and the intrastate business only 12 per cent, and the Virginia intrastate business represents only $\frac{1}{4}$ of one per cent of the total express business in the United States. In any view the intrastate traffic is not distinct and separable, but is merely incidental to the interstate commerce. It is essential not only in the interests of this Appellant but for the railroads over which it operates and which it serves as the agency for the conduct of a portion of their public responsibilities that these duties should be performed by a single agent. Indeed, it is necessary and vital for the shipping public of Virginia and of the other states, that both the intrastate and interstate business be conducted by one entity; and that interstate commerce be not burdened with the additional cost of the organization and operation of a separate domestic corporation and the inconvenience and inefficiency resulting from such operation.

Fourth. The Court erred in not giving section 163 of the Constitution of Virginia the previous constitutional construction which had been put upon it by the State Corporation Commission since 1918. In 1918 the American Railway Express Company, a Delaware corporation, of which your Petitioner and Appellant is the successor, was granted a certificate under sections 3845 and 3847 of the Code of Virginia 1919 to carry on both intrastate and interstate express business in Virginia without first securing a char- [fol. 295] ter of incorporation. Previous to that time in 1914 the Wells Fargo Company was refused such a certificate, but as the record shows from that time down to 1918, when it became merged in the American Railway Express Company it was allowed by the State Corporation Commission of Virginia to do both an intrastate and an interstate express business. From 1918 down to December 1928 the American Railway Express Company under its certificate to do business carried on both intrastate and interstate express transportation in Virginia until its property was acquired by your petitioner and appellant. In 1921 an express transportation company was organized for the purpose of carrying on express business, both intrastate and

interstate, over the twelve or fourteen railroads composing the Southeastern Express Company was granted by the State Corporation Commission a certificate to carry on express business both state and interstate in the State of Virginia and is to-day conducting such business and is a competitor of petitioner, engaged in the same kind of business. The only ground for refusing a similar certificate to do business in the State of Virginia to your petitioner and appellant is the claim as set out in the opinion of the highest court in Virginia that these certificates to those two express companies were erroneously granted. The real error committed by the Supreme Court of Appeals of Virginia is in refusing to follow these previous decisions (the only two arising in the State of Virginia since 1918) and in giving such a construction to section 163 of the Constitution of that state as makes that section void and unconstitutional because it deprives your petitioner of the equal protection of the law and further because it imposes a burden upon interstate commerce as conducted by your petitioner.

[fol. 296] Fifth. Much is made in the opinion in the instant case (record, page), 150 S. E. Rep. p. 419 of the extensive powers granted your petitioner and it is claimed in said opinion that such powers are not consonant with the powers generally granted to common carriers of either interstate or intrastate commerce. Such objection could have and should have been overcome, if necessary, by allowing your petitioner and appellant the right, exclusive of such alleged extensive powers, to a certificate to do only express transportation business both state and interstate.

Sixth. The court erred in not holding that, by reason of the nature of its business and the objects and purposes to be transacted and carried on, the Railway Express Agency is merely a joint agent or instrumentality of the railroads carrying on express transportation business in this state in conjunction with the other railroads of the Country. That your petitioner is merely the agent of said railroads and is not an independent public service corporation though technically a separate legal entity. To grant your petitioner and appellant a certificate to do business in this state would simply be to grant the railroads therein the right to do their own express business on their own lines by an agency

which, notwithstanding the fiction of its being a legal entity, is in truth and in fact a mere joint instrumentality or facility for doing over these Virginia railroads an express transportation business in this state in conjunction with the other railroads of the Country. That your petitioner is merely the agent of said railroads and is not an independent public service corporation though technically a separate legal entity. To grant your petitioner and appellant a certificate to do business in this state would simply be to grant the railroads therein the right to do their own express business on their own lines by an agency which, notwithstanding the fiction of its being a legal entity, is in truth and in fact a mere joint instrumentality or facility for doing over these Virginia railroads an express transportation business just as they now do freight business.

By reason whereof this petitioner and appellant prays that said decision and judgment of the Supreme Court of Appeals of Virginia may be reversed, etc.

[fol. 297] Dated the 28th day of January, 1930.

Wyndham R. Meredith, Attorney for Railway Express Agency, Incorporated.

[fol. 298] Supreme Court of Appeals of Virginia

[Title omitted]

Order Allowing Appeal

The Appellant in the above entitled suit having prayed for the allowing of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above styled suit by the Supreme Court of Appeals of the State of Virginia on the 10th day of January 1930 and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United

States from the Supreme Court of Appeals of the State of Virginia in the above entitled cause as provided by law, and it is further ordered that the Clerk of said Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the said in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.

In witness whereof I have hereunto set my hand this, [fol. 299] the 28th day of January, 1930.

Robert R. Prentis, Chief Justice of the Supreme Court of Appeals of the State of Virginia.

[fols. 300 & 301] Bond for appeal for $500.00 approved; omitted in printing.

[fol. 302] Citation, in usual form, showing service on Jno. R. Saunders, omitted in printing.

[fol. 303] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Feb. 27, 1930

Comes now the Appellant and adopts its assignment of errors as its statement of points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Wyndham R. Meredith, Counsel for Appellant.

Legal service of the within statement of points relied on by Appellant and the statement as to the printing of the record is this, the 28th day of January, 1930 accepted.

Jno. R. Saunders, Attorney General of the State of Virginia.

[fol. 303½] [File endorsement omitted.]

[fol. 304] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,827. Virginia Supreme Court of Appeals. Term No. 696. Railway Express Agency, Inc., appellant, vs. The Commonwealth of Virginia. Filed February 27, 1930. File No. 34,827.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 55

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

WYNDHAM R. MEREDITH,
800 Travelers Building,
Richmond, Va.

HARRY S. MARX,
ALBERT M. HARTUNG,
46 Trinity Place,
New York, N. Y.

Attorneys for Appellant.

THE WILLIAM BYRD PRESS, INC., RICHMOND, VA.

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

The Appellant in support of the jurisdiction of this Court to review the above entitled case on appeal respectfully represents:

A.

The Statutory Provisions Sustaining Jurisdiction

(1) That part of Section 237 of the Judicial Code, as the same was amended by the act approved February 13, 1925, and known as Chapter 229, Section 1 of 43 Stat. at Large, 937 (U. S. Code Annotated, Title 28, Section 344), which provides that "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question, the validity of a statute of any State, on the ground of its being repugnant

to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(2) The act approved January 31, 1928, and known as Chapter 14 of 45 Stat. at Large, as amended by an act approved April 26, 1928, and known as Chapter 440, 45 Stat. at Large, 456, which provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."
>
> "Sec. 2 as amended. The statutes regulating the right of a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right, and of invoking such relief, including the provisions relating to cost, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Judgment and Date of Application for Appeal.

The final judgment denying petition for a rehearing was entered on the 10th day of January, 1930 (Rec. p. 284), by the Supreme Court of Appeals of Virginia, the highest Court of Virginia in which a decision in this suit could be had.

The petition for a rehearing was filed January 7, 1930 (Rec. p. 263 and 283).

The application for this appeal was presented to the Chief Justice of the Supreme Court of Appeals of Virginia on the 28th day of January, 1930 (Rec. p. 290), and the order allowing the appeal was signed by the said presiding Judge on the 28th day of January, 1930 (Rec. p. 298).

Note.—All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Appeals of Virginia and on file with the Clerk of this Court. The record has not yet been printed.

C.

Nature of Case and Rulings Below.

The Appellant, Railway Express Agency, Incorporated, was incorporated under the laws of the State of Delaware with authority to engage in the transportation of property by express over railroad lines in and between all of the States of the United States, District of Columbia, Cuba, Hawaii, Canada and Mexico (Rec. p. 38). On January 25, 1929, a few weeks after its incorporation it applied informally for a certificate of authority to do business in Virginia as a foreign Express Company under Sections 3845 and 3847 of the Code of 1919, and Chapter 158 of said Code entitled "Express Companies." (Rec. p. 216.) It did not seek to enter the State of Virginia to transact a new business, but had succeeded to and was and is now conducting a business which has been carried on in the State of Virginia for upwards of sixty years (Rec. p. 20). It is the successor of the American Railway Express Company, also a corporation of the State of Delaware, which in 1918 was granted a certificate by the State Corporation Commission of Virginia, to do intrastate as well as interstate business in that State; it has assumed all of that Company's liabilities, and has purchased all its property, real and personal, its offices and equipment, its wagons and trucks, and all its supplies, and has taken over its entire organization, and is transporting goods at the same rates and subject to the same Classification and Tariffs previously in effect (Rec. p. 134, 182, 85, 192). The Appellant is a joint agency of the Railroads operating in and across the State of Virginia, and elsewhere, to conduct the express transportation business in their behalf (Rec. p. 190), and thus to provide the express service which the Railroads have not only the right but are under the legal obligation to furnish either directly or through an agent (Express Cases, 117 U. S. 1). Ownership in the stock of Appellant is limited to the Railroad Corporations participating in its organization (Rec. pp. 42).

The business for the year 1928 produced gross receipts for the entire United States of $285,063,377.03; for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,949.86 intrastate business, that is, the interstate Virginia business being 88 per cent and the intrastate business only 12 per cent, and the Virginia intrastate business representing only ¼ of one per cent of the total express business in the United States. (Rec. p. 133.)

The application of the Appellant for certificate of authority to do business in Virginia as a foreign Express Company was refused, and on March 4, 1929, it was formally renewed before said Corporation Commission and evidence taken on its right to be granted such certificate. (Rec. p. 117). On April 8, 1929, the State Corporation Commission refused a certificate of authority to Appellant to do an intrastate express business in Virginia; without prejudice, however, to the right of the Railway Express Agency, Incorporated, to engage in interstate commerce in Virginia (Rec. p. 216).

An appeal was taken to the Supreme Court of Appeals of Virginia, and it affirmed the order or judgment entered by the State Corporation Commission of Virginia, the order of the State Corporation Commision and the judgment of the Supreme Court of Appeals of Virginia being based solely on an alleged prohibition contained in Section 163 of the Constitution of the State of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (Rec. pp. 246-247) (150 S. E. Rep. 420). Section 163 reads as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating

against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

It was held that any foreign corporation not engaged in business at the time the Constitution of 1902 went into effect, and which thereafter sought to exercise the powers of a public service corporation, could not exercise such powers in the State of Virginia, unless it was first incorporated under the laws of the State of Virginia and became a domestic corporation of such State (Rec. p. 240, 256 and 257). Hence the right of Appellant to do an intrastate business was refused unless it should become a corporation of the State of Virginia, and it was held that as a condition precedent to the right to do such an intrastate business the Appellant, Railway Express Agency, Incorporated, must secure a charter as a corporation under the laws of Virginia (Rec. p. 240, 257). It was suggested both by the State Corporation Commission and the Supreme Court of Appeals of Virginia, that the Appellant might organize a corporation under the laws of the Commonwealth to do intrastate business, and if it desired to do so then merge with such domestic corporation, in which event the Appellant would become a domestic corporation of the States of Delaware and Virginia, subjecting both its intrastate and interstate business to the laws of those States applicable to corporations organized therein.

Appellant contended both before the State Corporation Commission (Rec. p. 111), and the Supreme Court of Appeals of Virginia (Rec. p. 28), that it was lawfully entitled,

under the above named Sections of the Virginia Code of 1919, to do an express transportation business both interstate and intrastate in the State of Virginia, and that a construction of Section 163 of the Constituion of Virginia denying the Appellant the right to conduct intrastate business was void and unconstitutional for the reasons:

First: That it was repugnant to the Commerce Clause of the Constitution of the United States, and the enforcement of the Virginia Constitutional provision wholly to exclude Appellant from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce (Rec. 263 et seq.); and

Second: That it is in conflict with the Constitution of the United States guaranteeing to citizens the equal protection of the laws in depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the Federal to the State Courts on the ground of diversity of citizenship (Rec. 271 et seq.).

From the final judgment entered on the 10th day of January, 1930, on Appellant's application for rehearing by the Supreme Court of Appeals of Virginia, the Appellant now appeals to the Supreme Court of the United States (Rec. pp. 298), and prays that the said judgment of the Supreme Court of Appeals of Virginia (the highest Court of the State in which a decision in this suit could be had), be reversed, upon the grounds: (1) that the said provision of the Constitution of the State of Virginia pursuant to which Appellant has been refused a certificate authorizing it to do an intrastate business in Virginia, is invalid as in violation of the Commerce Clause of the Federal Constitution (Article 1, Section 8, Paragraph 3 of the Constitution of the United States); and (2) in denying to Appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (Assignment of Errors, Rec. pp. 291 to 297).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court (among others) are believed to sustain its jurisdiction of this appeal.

Western Union Telegraph Co. vs. *Kansas*, 216 U. S. 1.
Pullman Co. vs. *Kansas*, 216 U. S. 56.
Herndon vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135.
Donald, Secretary of State of Wisconsin, vs. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329.
Kansas City Southern Ry. Co. vs. *Road Improvement District*, 266 U. S. 379, 385.
Frost & Frost Trucking Co. vs. *Railroad Commission of California*, 271 U. S. 583.
Hanover Fire Insurance Co. vs. *Harding*, 272 U. S. 494.
King Manufacturing Co. vs. *City Council of Augusta*, 277 U. S. 100.
Quaker City Cab Co. vs. *Commonwealth of Pennsylvania*, 277 U. S. 389.
Manley vs. *State of Georgia*, 279 U. S. 1.
Helson & Randolph, Co-Partners, vs. *Kentucky*, 279 U. S. 245.
New Jersey Bell Telephone Co. vs. *The State Board of Taxes and Assessments of the State of New Jersey*, No. 254, October Term, 1929, decided January 6, 1930.

(a) The power of a State to exclude a corporation doing an interstate business is not *absolute;* it is *relative.*

Western Union Telegraph Co. vs. *Kansas*, 216 U. S. 1, 33, 34.

> "It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the

> interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."
>
> "We are aware that in *Paul* vs. *Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, Sect. 2. *That was not, however, the case of a corporation engaged in interstate commerce;* and enough was said by the court to show, that, if it had been, *very different questions* would have been presented."

Concurring opinion of Mr. Justice White, later Chief Justice, in *Pullman Co. vs. Kansas*, 216 U. S. 56, 68, 70:

> "As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, *and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition.* * * * *Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce* * *." (Italics ours.)

(b) Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

Wisconsin Railroad Commission vs. C., B. & Q. R. R. Co., 257 U. S. 563

In that case it is stated at page 588:

> "It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

And at page 590:

> "This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

(c) The power of the State to exclude foreign corporations from doing business therein is subject to the important

qualification that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed.

Hanover Fire Insurance Company vs. Harding, 272 U. S. 494, 507.

"* * * It was settled in *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410, and *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 203; and *Looney* v. *Crane Company*, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, *Terral* v. *Burke Construction Company*, 257 U. S. 529; in cases which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation in the State but also on its property without the State, in violation of the due process clause of the Fourteenth Amendment, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws, *Southern Railway Co.*

v. *Greene*, 216 U. S. 400; *Air Way Corporation* v. *Day*, 266 U. S. 71. * * *"

Terral vs. *Burke Construction Company*, 257 U. S. 529, 532:

> *"The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."* (Italics ours.)

We respectfully submit that this Court has jurisdiction on this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act approved February 13, 1925, and the Act approved January 31, 1928, as amended by the Act approved April 26, 1928.

Wyndham R. Meredith,
800 Travelers Building,
Richmond, Va.

Harry S. Marx,
Albert M. Hartung,
46 Trinity Place,
New York, N. Y.

Attorneys for Appellant.

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CHARLES ELMORE CRO
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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 55.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee.

BRIEF FOR APPELLANT.

WYNDHAM R. MEREDITH,
HARRY S. MARX,
ALBERT M. HARTUNG,
Attorneys for Appellant.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 55.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee.

BRIEF FOR APPELLANT.

Opinion of Court Below and Grounds of Jurisdiction.

This case is here on appeal from a judgment of the Supreme Court of Appeals of Virginia, the highest court of that State, affirming an order of the Corporation Commission denying Appellant, a Delaware corporation, a certificate of authority to do an intrastate express business in Virginia in conjunction with its interstate business. The opinion of the Supreme Court of Appeals of Virginia is reported in 153 Va. 498 (150 S. E. 419), and is printed in full on pages 244-253 of the Record.

In accordance with paragraph 1 of Rule 12, Appellant, in due course, filed a Statement as to Jurisdiction on Appeal, and this Court on April 30, 1930, entered an order postponing consideration of the question of jurisdiction to the hearing of the case on the merits.

Statement of the Case.

Appellant was incorporated December 7th, 1928 under the laws of the State of Delaware to engage in the transportation of property by express over railroad lines in and between all of the States of the United States, the District of Columbia, Cuba, Hawaii, Canada, and Mexico (Rec. pp. 40-48). On January 25, 1929, Appellant applied informally for a certificate of authority to do business in Virginia as a foreign Express Company (Rec. p. 217). It did not seek to enter Virginia to transact a new business, but had succeeded to and was and is now conducting a business which has been carried on in Virginia for upwards of fifty years (Rec. p. 30). It is the successor of the American Railway Express Company, also a Delaware Corporation, which in 1918 was granted a certificate by the State Corporation Commission of Virginia, to do intrastate as well as interstate business in that State; it has assumed all of the liabilities of that Company, and has purchased all its property, real and personal, its offices and equipment, its wagons and trucks, and all its supplies, and has taken over its entire organization, and is transporting goods at the same rates and subject to the same Classifica-

tion and Tariffs previously in effect (Rec. pp. 137, 187, 188, 197). The Appellant is a joint agency of Railroads operating throughout the United States including in and across the State of Virginia, conducting the express transportation business in their behalf (Rec. p. 194). Ownership in the stock of Appellant is limited to Railroad Corporations (Rec. p. 45).

The business for the year 1928 produced gross receipts for the entire United States of $285,063,377.03; for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,-949.86 intrastate business, that is, the business transacted in Virginia was 88 per cent interstate and only 12 per cent intrastate, and the Virginia intrastate business represented only ¼ of one per cent of the total express business in the United States (Rec. p. 139). The business of the Appellant, principally interstate, is handled by one organization, with one system of supervision, overhead and accounting and with the same personnel, property and equipment; if a separate corporation were required in Virginia, separate trucks and different employees would be needed for each company and there would be great confusion, and difficulty of segregation (R. pp. 137, 138).

The informal application of the Appellant for a certificate of authority to do business in Virginia as a foreign Express Company was refused, and on March 4, 1929, the application was formally renewed before the Corporation Commission and evidence taken on Appellant's right to be granted such certificate (Rec. p. 121). The application was based upon Chapter 158, sections 4027 to 4033 of the Virginia Code of 1919, that chapter relating exclusively to

foreign express companies, and upon sections 3845 and 3847 of said Code, as amended. On April 8, 1929, the State Corporation Commission refused a certificate of authority to Appellant to do an intrastate express business in Virginia; without prejudice, however, to the right of the Appellant to engage in interstate business in Virginia (Rec. p. 216).

An appeal was taken to the Supreme Court of Appeals of Virginia, and it affirmed the order or judgment entered by the State Corporation Commission of Virginia, and like the Corporation Commission based its judgment solely on an alleged prohibition contained in Section 163 of the Constitution of the State of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (Rec. pp. 246, 247), reading as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incor-

porated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

The Supreme Court of Appeals of Virginia held that any foreign corporation not engaged in business at the time the Constitution of 1902 went into effect, could not exercise the powers of a Public Service Corporation intrastate in Virginia (Rec. pp. 244, 253, 254). It was suggested by the Supreme Court of Appeals, as it had been by the State Corporation Commission, that the Appellant might cause to be organized a corporation under the laws of the Commonwealth of Virginia to do intrastate business, and if it desired to do so then merge with such domestic corporation.

Appellant contended both before the State Corporation Commission (Rec. pp. 119, 120) and the Supreme Court of Appeals of Virginia (Rec. pp. 30-38) that it was lawfully entitled to do an express transportation business both interstate and intrastate in Virginia, and that a construction of Section 163 of the Constitution of Virginia denying to Appellant the right to conduct intrastate business was void and unconstitutional for that:

FIRST: It is repugnant to the Commerce Clause of the Constitution of the United States (Article 1, Section 8, paragraph 3) and the enforcement of the provision wholly to exclude the Appellant from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce (Rec. pp. 260, *et seq.*); and,

SECOND: That it is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States guaranteeing to citizens the equal protection of the laws,

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship (Rec. pp. 260, 261).

(b) By classification without any reasonable basis.

The Supreme Court of Appeals of Virginia denied a petition for rehearing on January 10, 1930, and the case was brought to this Court on appeal pursuant to Section 237 of the Judicial Code as amended, (United States Code Annotated, Title 28, Section 344), by the act approved January 31, 1928 (Chapter 14, 45 Stat. 54), as amended by the act approved April 26, 1928 (Chapter 440, 45 Stat. p. 466).

Specification of Assigned Errors to be Relied Upon.

Petitioner complains that the Supreme Court of Appeals of Virginia erred in affirming the order of the Corporation Commission denying to Appellant, a Delaware corporation, a certificate of authority to do an intrastate express business in Virginia in conjunction with its interstate business, and relies upon the assigned errors First to Sixth as the same are set forth on pages 259 to 264 of the record.

Summary of the Argument.

ARGUMENT.

POINT I. The Virginia Constitutional Provision as construed by the Supreme Court of Appeals of that State, denying the right of Appellant, to do an intrastate business, in conjunction with its interstate business, places a direct burden on interstate commerce, and is unlawful and void.

(a) The power of a State to exclude a foreign corporation to do intrastate business is not absolute; it is relative.

(b) The requirement of the State of Virginia must fall in order that interstate commerce be not unduly burdened.

POINT II. The decision is in conflict with the Constitution of the United States, guaranteeing to citizens the equal protection of the laws,

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship.

(b) By classification without any reasonable basis.

ARGUMENT.

I.

The Virginia Constitutional Provision, as construed by the Supreme Court of Appeals of that State, denying the right of Appellant to do an intrastate business in conjunction with interstate business, places a direct burden on interstate commerce, and is unlawful and void.

(a) The power of a State to exclude a foreign corporation doing an interstate business is not absolute; it is relative.

The power of a State to impose conditions on foreign corporations desiring to transact business therein, when such corporations are engaged regularly in interstate or foreign commerce *is not absolute; it is relative.* Addressing itself to this point this Court said in *Western Union Telegraph Co.* vs. *Kansas*, 216 U. S. 1, at pages 33, 34:

> "It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."

"We are aware that in *Paul* vs. *Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, Sect. 2. *That was not, however, the case of a corporation engaged in interstate commerce;* and enough was said by the court to show, that, if it had been, *very different questions would have been presented.*"

In the concurring opinion of Mr. Justice White, later Chief Justice, in *Pullman Co.* vs. *Kansas*, 216 U. S. 56, decided at the same time, he discussed this question and stated that as to foreign corporations engaged in the transaction of ordinary business the power of the State to exclude is *absolute;* whereas, as to corporations engaged in interstate or foreign commerce the power of the State is *relative*, stating at pages 68 to 70:

"As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, *and therefor no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition.* * * * *Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law*

> *which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1.* This follows, since the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. * * * It is to be observed that the conclusions just expressed take away from the States no lawful power. It leaves to the States the right to exert absolute authority where such power is possessed, and simply requires that where, as a result of the Constitution of the United States, the power is not absolute but is merely relative, not only the right of regulation *but likewise the right to exclude must be exerted conformably to the requirements of the Constitution of the United States; that is, in such a manner as not, either directly by the expression of a condition, or indirectly by its non-expression, to deprive of rights secured by that instrument.*" (Italics ours.)

The Appellant comes directly within the rule laid down by this Court in these cases. It is a Delaware corporation engaged in the transportation of property by express in and between all of the States of the United States, the District of Columbia, Canada, Mexico, Cuba and Hawaii; it is not seeking to transact a new business but has succeeded to a business which has been carried on for upwards of fifty years; a business which for the year 1928 produced gross receipts for the United States of $285,063,377.03;

for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,949.86 intrastate business, that is, the Virginia business was 88 per cent interstate and 12 per cent intrastate, and the Virginia intrastate business was only ¼ of one per cent of the total express business in the United States.

The Supreme Court of Appeals of Virginia construed Section 163 of the Constitution of that State to prohibit Appellant to transact the Virginia intrastate business. To transact such business it would be necessary for the Appellant to conduct the Virginia intrastate express business through a separate corporation, requiring other property, real and personal, equipment, wagons, trucks, supplies and stationery, offices and employes; and a separation of the intrastate from the interstate business, a task quite impracticable, if not impossible (Rec. pp. 137, 138).

The business of the Appellant is nation wide, it consists principally of interstate commerce and the interstate and intrastate shipments are handled by the one organization, with the same personnel, and with one system of supervision, overhead and accounting. Appellant picks up packages at the residence, or place of business, of the shipper, carts them by motor truck or wagon to the railroad station, forwards them in railroad trains, to the destination, where again it carts the packages, and, thus delivers them to the consignees. As stated by this Court in *Western Union* vs. *Kansas, supra*, 216 U. S. 1, at page 37, "the local business for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by

domestic companies organized to conduct only local business." The necessity for the conduct of the business by one entity seems to have been conceded by the Chairman of the State Corporation Commission upon the hearing on Appellants' application, when he stated

> "* * * I don't see how you could set yourself up to do an interstate business, in the transportation business and not do an intrastate business" (Rec. p. 137).

If one of Appellant's vehicles calls at the place of business of a merchant in Richmond, Virginia, and the merchant has a package to be shipped to Washington, D. C., the petitioner may accept it for transportation, but if the merchant also has a package which he wishes to ship to Alexandria, Virginia, then under the decision of the Supreme Court of Appeals of Virginia, petitioner may not accept it because it is Virginia intrastate business. In the reverse direction if a shipper in Washington, D. C., wishes to ship a package to a merchant in Richmond, Virginia, the Appellant may accept it for transportation, but if a competing shipper in Alexandria, Virginia, similarly desires to ship goods to the same merchant in Richmond, the petitioner may not accept it. This is typical of the situation and illustrates the impracticability and additional expense of the conduct of the business by two separate corporations rather than by the one corporation, and, of course, it is particularly marked with respect to points on or near the border lines of the State and from points in the State to other points therein, so located that the shipments may in some instances be transported wholly within Virginia, and

in other instances may be carried in and out of the State, in the course of transportation.

The effect of the decision of the Supreme Court of Appeals, if it be permitted to stand, would be to deprive the appellant and the public of the benefits to be had from the handling of the local in conjunction with the interstate business and bring about a method of operation wholly impractical and utterly inconvenient. The Richmond merchant with a shipment for Washington, D. C. would have a vehicle of the Delaware corporation call for the package, and another vehicle of the Virginia corporation to call for the intrastate shipment. The shipper should not be required to pay the rates necessary to support two such services.

If the Delaware and the Virginia corporations should unite in handling the business by joint equipment there would be necessary the segregation of the expense of the state and interstate business. This is always difficult and expensive, and, generally impossible of accurate accomplishment. There would be such commingling of state and interstate business that it would be extremely difficult, if not impossible, to determine with respect to some transactions whether the Federal or the State laws governed, and whether the Federal or the State Courts would have jurisdiction, especially as to shipments between points in Virginia, which might move either over routes lying wholly within the State, or over routes which pass in and out of the State; *e. g.*, shipments of milk and cream from Harrisonburg, Virginia, to Norfolk, Virginia, and from Woodstock, Virginia, to Richmond, Virginia, have been handled intrastate via Staunton, Virginia, intrastate via Alexan-

dria, Virginia, and interstate via Washington, D. C.; *Express Rates on Milk and Cream Between Stations In Virginia,* 88 I. C. C. 687 (R. p. 137-38). The effect of the Virginia Constitutional provision as construed by the Supreme Court of Appeals, would be substantially to burden interstate Commerce, and, therefore, it is unconstitutional and void, although it may not have been intended by the State to enact an invalid law; *Ludwig* vs. *Western Union Telegraph Co.,* 216 U. S. 146, 162.

Nor does the suggestion of the Supreme Court of Appeals of Virginia that the Appellant organize a subsidiary corporation, and if it so desire then merge with such corporation, lessen or remove the burden upon interstate commerce. The corporation then would be a domestic corporation of the States of Delaware and of Virginia, and be subject to the laws of those States applicable to corporations organized therein. Not only would the interstate business done in connection with Virginia be subjected to the State Laws, but also the entire business of the petitioner throughout the United States amounting to upwards of $285,000,000 per year, would be subject to regulations which the State of Virginia might impose upon domestic corporations of that State. It would be necessary to have meetings of stockholders held in Virginia (Code 1919, Sec. 3786), to have its principal office in the State (Sec. 3784), and Appellant's money and intangible personal property would be subject to taxation by the State (Va. Acts of 1928, p. 150; Tax Law Sec. 219), and all of Appellant's operations throughout the United States, and foreign countries, would be subjected to other laws now in effect, or hereafter enacted, in the State of Virginia, applicable

to domestic corporations and the merged corporation would "thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts * * *" (§ 3821, Va. Code 1919).

The Appellant has executed an indenture to the Guaranty Trust Company of New York, as trustee, providing for a total issue of $50,000,000 of bonds (Rec. pp. 197, 198), and with the approval of the Interstate Commerce Commission has issued $32,000,000 of the bonds (Rec. pp. 213, 214). As a Virginia Corporation it would be subject "to all the restrictions imposed upon corporations of the same class" (Virginia Code 1919, Section 3827), and could issue additional bonds only "after full compliance with the provisions of Section 167 of the Constitution of this State, so far as applicable" (*id.*)

The right to do the interstate business being unquestioned and indeed, unquestionable,—the Virginia Constitutional provision, as construed by the Supreme Court of Appeals, arbitrarily forbidding the Appellant to carry on with such interstate commerce, the local business, imposes a direct burden on interstate commerce, and is unlawful and void. *Pullman Company* vs. *Kansas*, 216 U. S. 56, 68.

Appellant urged before the Corporation Commission and in the Court below, *inter alia*, that Section 163 of the Virginia Constitution did not apply so as to require or justify the refusal of its application for certificate to do business in Virginia (Rec. pp. 14-24). The Section provides "* * * But this section shall not affect any Public Service Corporation whose line or route extends across

the boundaries of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect." Appellant contended that the Section was not applicable to it because, first, it was a corporation engaged in interestate commerce, and all of the lines or routes which it had contracted to use for the purpose of conducting an express business extended across the boundaries of the Commonwealth; and, second, that the clause "when this Constitution goes into effect" applied not to the time when the Company was incorporated, or to the time when it applied for a certificate to do business, but to the effective date of the Constitution and, therefore, excepted this Appellant as all of its lines or routes extended across the boundaries in 1902, when the Constitution became effective, except two small coal bearing railroads doing a negligible intrastate business (Rec. p. 139).

The State Corporation Commission, the body charged with the enforcement of this provision, in 1921 specifically adopted this view (Rec. p. 181); and it is to be observed that such construction renders the provision constitutional and valid, whereas, the construction of the Corporation Commission, and of the Court below, in the instant case, renders the section unconstitutional and void in imposing a direct burden on interstate commerce.

The opinion of the Court below cites, in support of its position, the cases of *Hemphill* vs. *Orloff*, 277 U. S. 537, *Pembina Mining Co.* vs. *Pennsylvania*, 125 U. S. 181, and *Ashley* vs. *Ryan*, 153 U. S. 436 (Rec. pp. 251, 253). These

cases are not applicable. *Hemphill vs. Orloff* and *Pembina Mining Co.* vs. *Pennsylvania* were cases of corporations engaged in ordinary business and not engaged in interstate or foreign commerce and, did not come within the class of corporations concerning which the power to exclude is only relative, *Pullman Company* vs. *Kansas*, 216 U. S. 56, 68, and, therefore, those cases do not support the validity of the Virginia Constitutional provision with respect to corporations which, like the Appellant, are engaged in interstate and foreign commerce. The case of *Ashley* vs. *Ryan*, 153 U. S. 436, likewise is not in point since it was there sought to consolidate a number of separate corporations into one corporation, and to become a domestic corporation of Ohio. There was no question of the right of a foreign corporation to do a business either interstate or intrastate in Ohio, but simply as to the conditions a State might impose with respect to the consolidation of a number of corporations into one domestic corporation. The Court specifically stated at page 446:

> "The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of."

(b) The requirement of the State of Virginia must fall in order that interstate commerce be not unduly burdened.

For many years the express business was conducted by independent companies under contracts with the individual

Railroad Companies. Such contracts usually provided for a division of the revenue between the Express Company and the Railroad Company respectively on a percentage basis, or in the case of the most recent contracts, the uniform contracts with the American Railway Express Company—for a reasonable net return to the Express Company. This method of operation of the express business was criticized by the Interstate Commerce Commission; *In Re Increase in Express Rates*, 51 I. C. C. 263, 268; *Consolidation of Express Companies*, 59 I. C. C. 459, 469; *Express Contract, 1920*, 59 I. C. C. 518, 525, 528; *Express Rates, 1922*, 89 I. C. C. 297, 319, 320; and suggestions were made that the Railroads should hold the stock of the Express Company, or operate the express business themselves. When the time approached for the expiration of the Amended Uniform Contract with the American Railway Express Company, a plan was adopted providing for the future conduct of the express business through a separate agency, a joint facility of the Railroads, controlled by them through stock ownership. The Appellant was organized by the participating Railroads for that purpose, as a Delaware Corporation; the stock is owned and held by them, and may be sold only to Railroad Corporations, and its directors are composed of Railroad executives. A contract, covering a period of twenty-five years beginning March 1, 1929, was executed between the participating Railroads and the Appellant, appointing Appellant as the exclusive agent for conducting and transacting all the express transportation business on such Railroads. After the

expenses of the Appellant have been paid, the entire earnings are paid over to the participating Railroads upon the basis of gross revenue for each company, and the Express Company receives no net return (Rec. pp. 190 to 196).

Following investigation and hearing the Interstate Commerce Commission held in *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* 150 I. C. C. 423:

> "* * * 2. That the acquisition by the participating railroads of control of the Express Agency by purchase of its capital stock will be in the public interest and that the consideration to be paid for the stock is just and reasonable; and, 3. That the proposed grouping of carriers and division of earnings in accordance with the terms of Article V of the proposed operating agreement *will be in the interest of better service to the public and economy in operation,* and will not unduly restrain competition, and that the consideration as between the carriers and the terms and conditions of said division of earnings are just and reasonable" (Rec. p. 201). (Italics ours.)

The express service is an integral part of the Railroad business; the Railroad Companies are required to furnish that service directly or through an agent; *Express Cases,* 117 U. S. 1. They have chosen to do so through the Agency of this Appellant, with the approval of the Interstate Commerce Commission, which specifically has held "* * * the acquisition of the control of the Appellant to be in the public interest, and that the proposed grouping of carriers and division of earnings provided in the operating contract will be in the interest of better service to the

public and economy in operation," and it follows necessarily that the requirement of the Constitutional provision of Virginia of incorporation of a separate domestic corporation to conduct the Virginia intrastate business, would defeat that purpose and impose an undue burden on a corporation engaged in interstate commerce as the price for handling the intrastate business incidental thereto.

Appellant operates in all of the States, and if Virginia might thus require incorporation, in addition to the incorporation in Delaware, so too could the remaining forty-six States, and the enormous resulting burden upon interstate commerce is too obvious to require more than mere mention.

> "Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation' * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases, supra*, pp. 48, 51; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate*

Cases, supra, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473."

Houston & Texas Ry. vs. *United States*, 234 U. S. 343, 350, 351, 352.

The business of the appellant is so intermingled that the supreme authority, the Nation, cannot exercise effective control over the interstate commerce without incidental regulation of the intrastate commerce. Hence such incidental regulation is not an invasion of State authority; *Wisconsin R. R. Commission* vs. *C., B. & Q. R. R. Co.*, 257 U. S. 588. In that case it is stated at page 588:

> "It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation

of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

And at page 590:

"This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

See also *Dayton-Goose Creek Ry.* vs. *U. S.*, 263 U. S. 456, 485.

These decisions follow the principles laid down by this Court in *Western Union Telegraph Company* vs. *Kansas*, 216 U. S. 1, wherein it was said at pages 37 and 38:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the State to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the

integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

Compliance with the requirement of the Virginia constitutional provision by incorporation of a separate corporation in Virgina, either with or without subsequent merger with the Delaware corporation, necessarily will add to the expense of conducting the interstate business, and, therefore, places an undue burden on interstate commerce. The converse of this situation was presented to this Court in *Colorado* vs. *United States, et al.*, 271 U. S. 153, where it was held that the Interstate Commerce Commission had authority to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad, lying wholly within the State of the owning company's incorporation, upon the ground that local conditions were such that public convenience and necessity did not require continued operation, and that such operation would result in large deficits constituting an undue burden upon interstate commerce, and the Court stated at pages 162, 163:

"* * * The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from

making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own

financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

> *"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."* (Italics ours.)

It is, therefore, respectfully submitted, that the requirement of the Virginia Constitutional provision denying to Appellant, a Delaware corporation, the right to conduct an intrastate business in conjunction with its interstate business, places an undue burden on interstate commerce and must fall.

II.

The decision is in conflict with the Constitution of the United States, guaranteeing to citizens the equal protection of the laws.

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship.

The power of the State to exclude foreign corporations from doing business therein is subject to the important qualification that the State may not exact as a condition of the corporation's engaging in business within its limits *that its rights secured to it by the Constitution of the United States may be infringed.* This rule has been laid down in a long series of decisions, and is very clearly and concisely stated by the late Mr. Chief Justice Taft, in the recent decision in *Hanover Fire Insurance Company* vs. *Harding*, 272 U. S. 494 and 507 as follows:

> "* * * It was settled in *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410, and *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the State may not

exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 203; and *Looney* v. *Crane Company*, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, *Terral* v. *Burke Construction Company*, 257 U. S. 529 * * *."

Mr. Chief Justice Taft reiterated the rule, so often enunciated by this Court, that a State may not as a condition of doing business therein require a foreign corporation to waive its constitutional right of resort to the Federal Courts, citing *Terral* vs. *Burke Construction Company*, 257 U. S. 529, in which case it was said:

> *"The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."* (Italics ours.)

It may be urged that the Virginia Constitutional provision does not prohibit a corporation from exercising its constitutional right of commencing suits in or of removing suits to the Federal Courts, but it accomplishes that result indirectly by denying to Appellant, a Delaware corporation, the right to handle the intrastate business in Virginia and requiring the organization of a separate corporation under the laws of Virginia to conduct such intrastate business and then if it is desired to have both the interstate and intrastate business conducted by one corporation, a merger with the Virginia corporation, thus forming a new corporation "which said consolidated corporation shall, upon the payment of a proper charter fee, thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts" (Secs. 3821-3827, Virginia Code) (Rec. pp. 242, 253).

The correctness of the statement that the Virginia Constitutional provision accomplishes indirectly that which it may not do directly is too obvious to require argument to support it, but it is interesting to note that the Supreme Court of Appeals of the neighboring State of West Virginia has held a somewhat similar statute to have that effect; *Rece, Admx.* vs. *Newport News & Mississippi Valley Co.*, 32 W. Va. 164 (9 S. E. 212). That case involved a statute of West Virginia which declared that foreign railroad corporations doing business in that State should be held and treated as domestic corporations, and required them to file an agreement to that effect. The Court held such agreement to be void, and that such foreign corporation might exercise such right in any proper

case notwithstanding its execution and filing of such agreement in pursuance of such statute. The Court said: .

> "Our statute (section 30, chapter 54, Code 1887) and the agreement of the defendant filed in pursuance thereof, do not, directly or in terms, stipulate that the foreign corporation shall or will not remove any suit from the state to the federal courts; but the statute does declare that the corporation filing such agreement shall be, 'as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings * * * as well as to all other matters relating to such corporation'; *and thus it does indirectly take from the corporation the right to remove into the federal courts any suits brought against it by a citizen of this State, because, as a domestic corporation, it can possess no such right.*" (Italics ours.)

The Virginia Constitutional provision goes farther; it denies entirely the right of the Appellant to do an intrastate business, and requires that a domestic corporation be organized to conduct that business and thus it accomplishes indirectly that which it has specifically been held may not be done directly. *Security Mutual Life Insurance Co.* vs. *Prewitt*, 202 U. S. 246, 269; *Pullman* vs. *Kansas*, 216 U. S. 56, 70. The State of Virginia may not lawfully deprive the Appellant of its constitutional right of resort to the Federal Courts by any law, rule, or regulation, and it may not do so directly or indirectly; *Terral* vs. *Burke Construction Company, supra; Barron* vs. *Burnside*, 121 U. S. 186; *Southern Pacific Company* vs. *Denton*, 146 U. S. 202, 207; *Barrow Steamship Co.* vs.

Kane, 170 U. S. 100, 110, 111; *Western Union Telegraph Co.* vs. *Kansas*, 216 U. S. 1; *Pullman* vs. *Kansas*, 216 U. S. 56; *Ludwig* vs. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* vs. *C., R. & I. P. Ry.*, 218 U. S. 135; *Harrison* vs. *St. L. & San Francisco R. R.*, 232 U. S. 318; *Donald, Secretary of State of Wisconsin* vs. *Philadelphia & Reading Coal & Iron Company*, 241 U. S. 329; *Frost & Frost Trucking Co.* vs. *Railroad Commission of California*, 271 U. S. 583, 593-599.

In *Barron* vs. *Burnside*, 121 U. S. 186, at page 200 the Court stated:

> "* * * while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so by imposing on the corporation a sacrifice of its constitutional rights."

See also *Hanover Fire Ins. Co.* vs. *Harding*, 272 U. S. 494, 514, *supra*.

Even in the case of foreign corporations not engaged in commerce the restrictions upon the right of entry into it by a State must not be repugnant to the Constitution or laws of the United States; *Lafayette Ins. Co.* vs. *French*, 18 How. 404; *Insurance Co.* vs. *Morse*, 20 Wall. 445.

In expressing views which were afterwards adopted in *Terral* vs. *Burke Construction Co.*, 257 U. S. at page 533, Mr. Justice Day in his dissenting opinion in the case of *Security Mutual Life Insurance Co.* vs. *Prewitt*, 202 U. S. at page 262, speaking of the case of *Barron* vs. *Burnside*, *supra*, said:

> "It is thus apparent that the decision was made to turn not upon the question of whether the agreement not to remove had been required in advance or im-

posed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the state to exclude foreign corporations, its right to do business within the state could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured."

And again:

"The doctrine that the surrender of the rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in its essential provisions."

The case of *Herndon* vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135, seems conclusive upon the point that the Virginia Constitutional provision is void on the ground that it is in conflict with the equal protection of the laws provision of the Federal Constitution. The Missouri Statute there considered provided that if removal to the Federal Court were attempted by a foreign railroad corporation, its certificate of authority to carry passengers or freight from one point in the State to another point in the State should forthwith be revoked by the Secretary of State, and its right to do such business should cease. It further provided that "the revocation of such certificate of authority or the cessation of such right shall not be deemed to prohibit or prevent such corporation from * * * making

what are known as *interstate* shipments and transportation."

In other words, the Missouri Statute did not revoke the right to do all business. It revoked only the right to do intrastate business, if the foreign railroad company exercised its federal right of removal of suits. Nevertheless, the statute was held unconstitutional and void. (*Herndon* vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135.) In the instant case the Appellant may carry on its *interstate* business untrammelled by the State authorities, but it is denied the right to do its local along with its interstate business unless it causes a domestic corporation to be organized to conduct such local business, thereby being deprived of its Federal right of access to the Federal Court on the ground of diversity of citizenship.

The provision (Section 163) of the State Constitution, which, as construed by the Supreme Court of Appeals of Virginia, forbids Appellant to conduct with its interstate commerce a local business unless it causes a separate corporation to be organized, denies to such interstate commerce corporation the exercise of the Federal right of bringing suits in or of removing suits brought against it to the Federal Courts on the ground of diversity of citizenship, and thereby imposes a direct burden on such corporation engaged in interstate and foreign commerce, as the price to be paid by it for the privilege of doing local in conjunction with such interstate business. This is so because "the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, * * * the exact equivalent of placing a

direct burden on its interstate commerce business." *Pullman Co.* vs. *Kansas*, 216 U. S., Concurring Opinion, at page 68.

(b) By Classification without any reasonable basis.

The equal protection of the laws has been denied to the Appellant by the construction given to Section 163 of the Constitution of Virginia, by the State Corporation Commission, and by the Supreme Court of Appeals, denying to Appellant the right to conduct the intrastate express business in Virginia in conjunction with its interstate business, and permitting other foreign corporations, similarly situated, to conduct the intrastate business in Virginia.

From 1914 to 1918 Wells Fargo & Company, a Colorado corporation, carried on an interstate and intrastate express business in Virginia without interference. In 1918 the American Railway Express Company, a Delaware Corporation, of which the Appellant is the successor, was granted a certificate under Sections 3485 and 3487 of the Code of Virginia, to carry on both interstate and intrastate business in Virginia (Rec. p. 137), and in 1921 the Southeastern Express Company, an Alabama Corporation, operating over the Southern Railway System, and its subsidiaries, was granted a certificate to carry on an express business, both interstate and intrastate in Virginia (Rec. p. 179), and it is today engaged in the conduct of such business, and is a competitor of the Appellant, which, at the same time, is denied the right to conduct an intrastate express business in Virginia. Such discrimination against Appellant rests upon no reasonable ground and, in fact,

appears to have no basis whatever to support it, and denies to Appellant the equal protection of the laws which the Federal Constitution guarantees.

Conclusion.

In the decision of the Corporation Commission it is said that to permit a foreign corporation to do an intrastate business would be "destructive of the power of the State to adequately regulate Public Service Corporations doing intrastate business in Virginia", (Rec. p. 232); but this is not true, because as to intrastate business the State has full powers of regulation, whether such business is carried on by a domestic corporation or a foreign corporation. It is not necessary for the State to take entire charge of the business of a corporation, state and interstate, in order to regulate the intrastate business. Appellant does not object to reasonable regulation of its intrastate business by the State. The Appellant has no disposition or desire to escape or avoid reasonable regulation. It has complied with the laws of the forty-six States, other than Delaware and Virginia, and has been authorized to and is conducting business therein as a foreign corporation. It sought similarly to do business in Virginia. It applied for a certificate of authority to do business in Virginia under the statutes which then appeared to it and now appear to it to be applicable, and it was and is ready and willing to comply with those statutes, and with any reasonable and proper requirements relating to the conduct of its business as a foreign corporation in Virginia, but it urges respectfully that the denial by the

Supreme Court of Appeals of Virginia, of its right to conduct the intrastate business in conjunction with its interstate business constitutes a direct burden on interstate commerce and is in conflict with the provision of the Constitution of the United States guaranteeing to it the equal protection of the laws, and, therefore, prays that the judgment of the Supreme Court of Virginia be reversed.

Respectfully submitted,

WYNDHAM R. MEREDITH,
HARRY S. MARX,
ALBERT M. HARTUNG,
Attorneys for Appellant.

Dated November 11, 1930.

FILE COPY

DEC 31 1930

Supreme Court of the United States

October Term, 1930.
No. 55

RAILWAY EXPRESS AGENCY, INCORPORATED, APPELLANT

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION, APPELLEE

Appeal from the Supreme Court of Appeals of the State of Virginia

---

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

JOHN R. SAUNDERS,
Attorney General.
EDWIN H. GIBSON,
COLLINS DENNY, JR.,
Assistants Attorney General.

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Appeal from the Supreme Court of Appeals of the State of Virginia

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Appeals of Virginia (R. p. 244)* is officially reported in 153 Va. 498. The unofficial citation is 150 S. E. 419.

II.

STATEMENT OF FACTS

Section 153 of the Constitution of Virginia, adopted in 1902, and found in the Code of Virginia, 1919, at page CLXXII, provides in part as follows:

> ". . . the term 'transportation company' shall include any . . . express company . . . ;"

and further:

> ". . . the term 'public service corporation' shall include all transportation . . . companies . . . ."

The appellant, Railway Express Agency, Incorporated, was chartered under the laws of the State of Delaware on December 7, 1928. By its certificate of incorporation (R. pp. 40-47) it is not only empowered to engage in intrastate, interstate and international express business by all known means of transportation, but it is also empowered "To own, construct, purchase, lease or otherwise acquire and to use, equip . . . and maintain railway cars, rolling stock and machinery of all kinds; also

*All references to the record are to the printed record. Italics are supplied by counesl except where otherwise stated.

wagons, trucks, motor vehicles, airplanes," etc.; also "ice houses, ice factories, refrigerating plants, warehouses . . . ; garages, stables, hangars," etc. It is further empowered to buy and hold personal property of all kinds "without restriction or limit as to amount"; to acquire and dispose of real property without limitation; to engage in any kind of manufacturing business; to acquire and deal in copyrights, etc.; and to acquire and deal in stocks, bonds, etc., of other corporations.

By paragraph 9 (R. p. 43) it is empowered:

> "To organize or cause to be organized . . . a corporation or corporations for the purpose of accomplishing any or all of the objects for which this corporation is organized . . ."

It is further empowered to purchase the business and to assume the obligations of other persons, firms or corporations, to manage or operate such business, and generally to carry on such lawful business as may seem to its Board of Directors "appropriate to be carried on in connection with the above purposes."

By the certificate of incorporation stock ownership is limited to railroad corporations; the "private property of the stockholders shall not be subject to the payment of the corporate debts to any extent whatever;" the Board of Directors is empowered to sell all the assets of the corporation, including its corporate franchise; and the right to amend is expressly reserved.

On January 25, 1929, appellant informally applied to the State Corporation Commission of Virginia for a certificate of authority to do business in Virginia in accordance with section 3847 of the Code of Virginia,

1919; this application was refused, and formal application was made on March 4, 1929 (R. pp. 115 *et seq.*, 217-218). This application also was refused by the State Corporation Commission (R. p. 216) and, an appeal being taken to the Supreme Court of Appeals of Virginia, the order of the Commission was approved (R. p. 254), without prejudice, however, to the right of appellant to engage in interstate business in Virginia.

The application of appellant was refused because of the provisions of section 163 of the Constitution of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (R. pp. 245-246), the pertinent parts of which are as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation . . . But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect . . ."

This clause was construed to prohibit the entrance into Virginia of any foreign public service corporation which had no line or route extending across the boundary of Virginia in 1902, when the Constitution went into effect, or which was not at that time engaged in lawful business within that Commonwealth; and it was accordingly adjudged that the appellant, neither having had such a line or route at that time, nor having been engaged at that

time in any lawful business therein, was not entitled to do an intrastate express business in Virginia (R. p. 248).

It was insisted before both the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia that the appellant was simply a joint agency or facility of the railroads which as stockholders or otherwise were interested in it, and that a grant of authority to the Railway Express Agency, Incorporated, to do an intrastate business in Virginia, would be tantamount only to a grant of authority to those participating Virginia roads which already were authorized to do an intrastate business in Virginia (R. pp. 5, 8). It was further suggested that, as the appellant had purchased the property of the American Railway Express Company and had assumed the liabilities of that company, it was the successor of that company and, by virtue thereof, was entitled to the privilege possessed by that company of doing an intrastate express business in Virginia.

It was held first by the State Corporation Commission of Virginia and on appeal by the Supreme Court of Appeals of Virginia that the appellant was not such a joint agency or facility of the participating railroads as would entitle it to do an intrastate express business in Virginia, and that the appellant was not the successor of the American Railway Express Company in the sense that it acquired the privilege of that company to do an intrastate express business in Virginia.

Before the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia it was argued that the Interstate Commerce Clause of the Federal Constitution required that a certificate of authority to do an intrastate business in Virginia be issued to the appellant; and before the Supreme Court of Appeals of

Virginia, though not before the State Corporation Commission, it was also argued that to refuse to issue such a certificate would be to deny to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution. Neither of these arguments was considered to have merit.

SUMMARY OF THE ARGUMENT

Point I. The questions before this court for determination:

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia and the right of appellant as a "joint agency or instrumentality" of the several railroads, or as "successor" to the American Railway Express Company, to do an intrastate express business in Virginia are questions finally concluded.

The sole question here is whether the effect of the interpretation given violates any properly pleaded provision of the Federal Constitution.

Point II. The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does no violence to the Commerce Clause of the Federal Constitution (Article I, section 8, paragraph 3), nor does that interpretation unlawfully burden the interstate commerce of the Railway Express Agency, Incorporated.

(a) The power of a State to exclude a corporation from doing business within its borders is limited by two conditions only: first, a State may not prevent the transaction of interstate business within its borders;

second, it may not exclude a corporation in the employ or under the control of the Federal government.

(b) That interpretation does not unduly burden interstate commerce.

Point III. The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does not violate that provision of the Fourteenth Amendment to the Federal Constitution which prevents a State from denying to any person within its jurisdiction the equal protection of the laws.

(a) The benefits of that provision may be had by a foreign corporation only after permission to do an intrastate business has been granted.

(b) No attempt is made, either directly or indirectly, by contract or otherwise, to deprive the Railway Express Agency, Incorporated, of its right to institute suits in the Federal courts, or to remove suits from the State to the Federal Courts.

(c) That interpretation results in no unreasonable classification.

ARGUMENT

I.

The questions before this court for determination:

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia and the right of appellant as a "joint agency or instrumentality" of the several railroads, or as "successor" to the American Rail-

way Express Company, to do an intrastate express business in Virginia are questions finally concluded.

The sole question here is whether the effect of the interpretation given violates any properly pleaded provision of the Federal Constitution.

The interpretation given to section 163 of the Virginia Constitution by the highest tribunal of that State is final and binding even on this court; the question here is whether that section as interpretated violates any provision of the Constitution of the United States, for here only the Federal question in a cause of this character can be considered.

In two recent decisions this court, speaking through the late Mr. Chief Justice Taft, has unqualifiedly adhered to this principle. In *Truax* v. *Corrigan*, 257 U. S. 312, it is said:

> ". . . this court is bound by the judgment of the State supreme court . . . in the construction which that court puts upon the statute."

And in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, it is said:

> "It is true that the interpretation put upon such a tax law of a State by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. . . ."

The highest court of Virginia has so construed the pertinent section of the Constitution of Virginia as to prevent the appellant from engaging in intrastate commerce therein, even though the railroads over whose lines it would operate may engage in such commerce, and even though those railroads own a portion of its stock, or may receive a share of the profits earned by it, and even though it has entered into contracts with those roads and has purchased the physical properties of the American Railway Express Company.

The correctness of that construction cannot be questioned here, it can simply be inquired whether that construction contravenes one or the other of those portions of the Federal Constitution which the appellant invokes as its warrant for attempting to force itself into the field of domestic business in Virginia in the teeth of the fundamental law of that Commonwealth.

The appellant raises two and only two Federal questions. They are: an alleged conflict between section 163 of the State Constitution and Article I, section 8, paragraph 3, of the Federal Constitution; and an alleged conflict between that section of the State Constitution and that portion of the Fourteenth Amendment which assures to citizens the equal protection of the laws.

II.

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does no violence to the commerce clause of the Federal Constitution (Article I, section 8, paragraph 3), nor does that interpreta-

tion unlawfully burden the interstate commerce of the Railway Express Agency, Incorporated.

(a) The power of a State to exclude a corporation from doing business within its borders is limited by two conditions only: first, a State may not prevent the transaction of interstate business within its borders; second, it may not exclude a corporation in the employ or under the control of the Federal government.

In effect it is asserted by the appellant that because of the Commerce Clause of the Federal Constitution, if a foreign corporation has entered a State *vi et armis* of the Federal Constitution for the purpose of transacting an interstate business therein, the State is powerless to prevent that foreign corporation from doing a domestic business therein. If correct, the proposition as asserted cannot be restricted to those undertakings which are concerned with the transportation of goods and persons, but must of necessity apply to all business enterprises, for commerce is broader than the mere shipment of goods and transportation of passengers; it involves the innumerable and multifarious transactions of our present complicated business life. If the proposition asserted by the appellant be sound, that proposition applies not only to a corporation doing an interstate express business, but applies equally to an ordinary business corporation whose interstate operations fall under the protecting wings of the Federal Constitution, for as has been recognized by this court, the interstate business of merchant and trader is as much entitled to Federal protection as is that of our largest common carrier. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

It is believed that such a proposition finds no foundation in the Federal Constitution; that it is subversive of those powers which are therein expressly reserved to the States, and that it destroys the right and power of a State adequately to regulate public service corporations doing a domestic business within its borders, or to determine the right of an ordinary foreign corporation to transact an intrastate business therein.

The proposition asserted by the appellant has nothing to do with the *right or power* of a State to impose conditions upon a foreign corporation for the *privilege* of transacting within its borders an intrastate business, nor is it concerned with the nature or validity of any restrictions imposed. It goes far beyond any proposition hitherto advanced and asserts that, if a corporation sees fit to avail itself of the *right* given by the Federal Constitution to transact an interstate business in any State, it thereby acquires the right to demand that it be given the *privilege* of doing an intrastate business. If the proposition be correct, the State no longer confers a privilege, for a privilege is that which may be either withheld or it may be granted. On this principle alleged by the appellant, when a corporation comes into a State and demands the right to do an intrastate business, the element of privilege is non-existent, for it comes not as one asking that a petition be granted, but it rather comes as one demanding that a right secured by higher law be recognized. In the latter sense, there comes into a State a corporation which is transacting a purely interstate business; it asks no privilege of the State; it demands by virtue of the Federal Constitution that the right thereby guaranteed be recognized. The very act of the Railway Express Agency, Incorporated, in requesting of the Commonwealth of Vir-

ginia that it be empowered to transact business therein, is a recognition of the power of that Commonwealth to grant or withhold some privilege which that corporation seeks. It is accepted by all parties and recognized by the highest tribunal of that Commonwealth that such a petition is not necessary for the transaction of interstate business. It, therefore, must be considered either that this corporation is engaged in a vain gesture of asking for the privilege of transacting intrastate business when it already had the right to do so, or else that the Commonwealth of Virginia has the right to grant or refuse that privilege as by its law may be determined.

That such a proposition as is asserted by the appellant is subversive of powers expressly reserved to the States, and is destructive of their right to deal with intrastate commerce, is evidenced by the following example. Many of the States require of one, who wishes to use motor vehicles for the transportation of goods and passengers in intrastate commerce, that he must first obtain a certificate of convenience and necessity for such transportation (see Virginia Acts of Assembly, 1930, page 894). In *Buck* v. *Kuykendall*, 267 U. S. 307, and in *Bush* v. *Maloy*, 267 U. S. 317, it was held that a State may not prevent a foreign motor vehicle carrier from entering the State and using its highways in interstate business. If the right to do interstate business carries with it the right to do intrastate business, any foreign corporation, which now or hereafter does, in and through any State, the business of an interstate motor vehicle carrier, may, despite the convenience and necessity of the people or localities, tear to pieces the policy of the State and its commerce and engage in domestic business therein.

Nor is it believed that the appellant has succeeded in founding its right to do an intrastate business in Virginia on any declaration of this Supreme Court. The cases cited by the appellant deal not with the right of a State to prohibit a foreign corporation, whether public service or otherwise, from doing an intrastate business, but those cases refer solely to the nature of the conditions which may be required of a foreign corporation which seeks to do a domestic business within a State and whether or not those conditions would demand of the foreign corporation a repudiation of the rights guaranteed by the Constitution of the United States. It is rather believed that the decisions of this highest tribunal have uniformly recognized the right and power of a State to exclude, as it sees fit, a foreign corporation from doing a domestic business within its borders.

The fundamental rights of a State in its dealing with a foreign corporation are thus laid down in *Paul* v. *Virginia*, 8 Wall, 168:

> ". . . The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. *They may exclude the foreign corporation*

> *entirely;* they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

It is frankly admitted that the quoted language would, on first consideration, appear to confer upon the States powers broader than are actually held by them. That case involved the right of a foreign insurance company to issue policies of insurance in another State. It was pointed out that these policies were not articles of commerce and the court was, therefore, concerned solely with the right of the corporation to do such a domestic business in a State other than that within which it was incorporated.

This broad, general statement quoted is, therefore, to be confined within the limits of the facts to which it applied. The right of a State *to impose conditions precedent* to the doing of a domestic business therein is limited in the sense that it may not require of a corporation that it resign Federal rights; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; for instance, it cannot require that a foreign corporation give up its right to institute proceedings in the Federal courts, or to remove cases thereto; *Terral* v. *Burke Construction Co.*, 257 U. S. 529; or that it submit to taxation of property located beyond the jurisdiction of the State; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460. It is further admitted, and is hereinafter discussed,

that a State cannot impose as a condition precedent undue burdens or restrictions upon interstate commerce.

Nor is the right of a State *to exclude* a foreign corporation an absolute right. It was said in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, quoting from *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246, that—

> ". . . 'a State has the right to prohibit a foreign corporation from doing business within its borders, *unless such prohibition is so conditioned as to violate some provision of the Federal Constitution*' . . ."

A State accordingly may not prevent a corporation from engaging in interstate or foreign commerce; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; nor may it prevent a corporation in the employ or under the control of the Federal government from doing business within its borders; *Stockton* v. *Baltimore and New York Ry. Co.*, 32 Fed. 9; *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U. S. 181.

Beyond these limitations no decision of this tribunal has gone, and it is believed that the general principle asserted in *Paul* v. *Virginia*, *supra*, limited as above enumerated, accurately defines the power of a State and the right of a foreign corporation.

In this connection the appellant in his brief relies primarily upon the cases of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56, and *Ludwig* v. *Western Union Telegraph Co.* 216 U. S. 146. In addition to those, when the appellant was before the State Corporation Commission of Virginia, it

relied upon the cases of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, and *Crutcher* v. *Kentucky*, 141 U. S. 47 (R. p. 232).

In the first two cases mentioned above the court was concerned with the effect on foreign corporations, which had long been legally doing business within the State, of an act which required that a fee of a certain per cent of the authorized capital of foreign corporations should be paid for the benefit of the State school fund. It was contended by the corporations that the requirement of such a fee "as a condition of its right to continue to do domestic business" was a burden on interstate commerce and unconstitutional. In neither of those cases was the court concerned with the right of a State to prohibit the doing of a domestic business therein; it was concerned solely with the right of a State to levy a tax upon capital representing as it did property within and without the State as a condition precedent to the *continuation* of the transaction of intrastate business.

Ample evidence that this was the question in *Western Union Telegraph Co.* v. *Kansas, supra,* is found in the following quotation:

> "Whatever may be the extent of the State's authority over intrastate business, was it competent for the State to require that the telegraph company —which surely had the right to enter and remain in the State for interstate business—as a *condition of its right to continue doing domestic business in Kansas* should pay, in the form of a fee, a specified per cent of its capital stock . . . ?"

And elsewhere therein it is said:

> ". . . It is important here to observe—indeed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and State, for the purposes of its business of every kind long before, and was legally there when, the Bush Act was passed. . ."

In *Pullman Co.* v. *Kansas, supra,* it is emphasized that—

> "The Pullman Company is admittedly engaged, as it has been continuously for many years, in commerce among all the States of the Union, as well as in intrastate business in Kansas. . . ."

In support of his position the appellant also relies upon *Ludwig* v. *Western Union Telegraph Co., supra.* The Act of Arkansas there involved was closely similar to that of Kansas just considered, with the exception that the Arkansas Act made no attempt to distinguish between interstate commerce and intrastate commerce. On the authority of *Western Union Telegraph Co.* v. *Kansas, supra,* this court held that, even if such a distinction were read into the statute, the act would still be void. Here also great stress is laid upon the fact that for many years the company had been doing a local business in the State with the State's permission and acquiescence.

In the two Kansas cases above mentioned, Mr. Justice White filed an opinion concurring in the result reached by the four justices who approved the majority opinion. In his concurring opinion in *Western Union Telegraph Co.*

v. *Kansas, supra,* while agreeing with the conclusions and reasoning of the majority opinion, he relies upon the fact that for many years the company had been engaged in a lawful domestic business within Kansas and that to require of it further that it pay a per cent of its authorized capital in order to continue that business was to deprive it of its property without due process of law.

The only expression which can be found in the records of the Supreme Court of the United States supporting the sweeping claim of the appellant is in Mr. Justice White's concurring opinion in *Pullman Co.* v. *Kansas, supra.* As quoted on page 9 of the brief for appellant, he points out that the State has no absolute power to exclude a corporation, but that its power is only relative, and he further says:

> ". . . Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1. . . ."

No other justice of this court concurred in this statement of Mr. Justice White's. This isolated quotation is in the teeth of his former opinion in *Ashley* v. *Ryan,* 153 U. S. 436, to which reference will hereafter be made. In the case of *Pullman Co.* v. *Kansas, supra,* Mr. Justice Holmes dissented, together with Mr. Chief Justice Fuller and Mr. Justice McKenna. In that dissent reference is

made to this sweeping statement of Mr. Justice White's as follows:

> ". . . I do not see how or why the right of a State to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the State is only relative, and in the sense that it is confined to the local business, I agree, But in the sense that it is not absolute over that local business the statement seems to me merely to beg the question that is to be discussed. . . ."

In the case of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, the only question involved was the power of the State of Florida to grant to the Pensacola Company, a Florida corporation, the exclusive right to construct telegraph lines in two counties in Florida to the exclusion of the Western Union Company, a foreign corporation engaged in interstate commerce, when the Western Union Company had secured by contract with a railroad company the right to construct its lines along the right of way of that railroad company. It was held that Florida could not prohibit the Western Union Company from constructing its lines so long as that company did not need to invoke the power of condemnation to construct those lines. But no reference whatsoever is made to the question whether Florida could prohibit the Western Union Company from doing an intrastate business.

The court very strongly relied upon the Act of Congress approved July 24, 1866, entitled, "An Act to aid

in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," the effect of which is thus stated by the court:

> ". . . It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.
>
> . . . . . .
>
> "No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

The last case relied upon by the appellant is *Crutcher* v. *Kentucky*, 141 U. S. 47. The question there involved was whether a statute of Kentucky, which statute required a person who was an agent of a foreign express company admitted to the State to do both an interstate and intrastate business to take out a license to act as the agent of such company in the doing of *all* its business, was a violation of the Federal Consitution. Because the Kentucky statute made no distinction between interstate and intrastate commerce and, in effect, required of an agent engaged in interstate commerce that he take out a State license, the statute was held to be unconstitutional.

So much for the cases relied upon by the appellant. On the other hand, this court has repeatedly asserted the

power of a State to prohibit a foreign corporation from doing a domestic business within its borders.

In *Relfe* v. *Rundle,* 103 U. S. 222, the court, speaking through Mr. Chief Justice Waite, said:

> ". . . No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations . . . ."

In *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania,* 125 U. S. 181, the court, after reviewing the earlier authorities, says:

> ". . . The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them,

such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. . .

"*The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign.* The control of such commerce, being in the Federal government is not to be restricted by State authority."

In *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, the court, after reviewing numerous authorities, says in no uncertain terms that a State has the power to exclude a corporation, but that from this language it is not to be implied that the State can prevent a foreign corporation from transacting within its borders commerce between that State and other States.

In *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, it is laid down as an established principle of law that a State has the right to exclude a foreign corporation from doing business within its borders, subject to the limitations which have hereinbefore been mentioned.

In *Ashley* v. *Ryan, supra*, it is true that the court was primarily concerned with the power of the State of Ohio to determine upon what conditions the laws of Ohio touching consolidation of corporations might be availed of. It was there contended on behalf of railroads seeking to consolidate that the conditions required by Ohio violated the Commerce Clause of the Federal Constitution.

The contention made is closely analogous to that made in the instant case. In the *Ashley Case* an Ohio corporation, and corporations of other States engaged in interstate commerce, desired to consolidate under the Ohio law, and it was argued that the conditions prescribed by the Ohio law were violative of the Federal Constitution. There was no question touching the right to engage in interstate commerce. In the instant case the appellant is seeking to do an intrastate business in Virginia and it is said that a provision of the State Constitution, allowing only domestic corporations to do an intrastate express business, is violative of the Commerce Clause of the Federal Constitution. This Virginia law involves no question of a right to do interstate commerce. In the *Ashley Case* it is said:

> ". . . As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisites to corporate life. . . ."

In *Hemphill* v. *Orloff*, 277 U. S. 537, it is said:

> "It is settled doctrine that a corporation organized under the laws of one State may not carry on local business within another without the latter's permission, either express or implied. . . ."

Perhaps no other decision of this court so clearly indicates the right of a State to exclude a foreign corporation from doing a domestic business therein, even though

it is already doing an interstate business, as does that of *Herndon* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135. An Arkansas statute provided that all trains should stop at junction points to admit and discharge passengers, and another statute provided that, if a foreign corporation removed a case to a Federal court or brought suit in a Federal court, its license should be revoked. The railroad company brought suit in a Federal court to enjoin the enforcement of the first mentioned statute, and likewise to enjoin the enforcement of the last mentioned statute. In both respects the railroad company was successful. In the discussion of the second question involved in the *Herndon Case* this court expressly indicated that a State would have the right to exclude a foreign corporation from doing a domestic business within its borders, even though that corporation were doing an interstate business therein, for it says:

> ". . . Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. . . . In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that *while the right to do local business within the State may not have been derived from the Federal Constitution*, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

The appellant in his brief points out that some of these cases cited are cases of corporations engaged in ordinary

business and not engaged in interstate or foreign commerce. But in this last cited case, one which is strongly relied upon by the appellant, this court makes it clear that, while a State may not revoke the license of an interstate railroad to do an intrastate business within its borders because it resorts to a Federal court, that right of resort being assured by the fundamental law, nevertheless, the fundamental Federal law gives to a foreign corporation no right to demand of a State that it be permitted to do a local business therein.

(b) That interpretation does not unduly burden interstate commerce.

The appellant argues that the construction placed on section 163 of the Constitution of Virginia by the Supreme Court of Appeals of that Commonwealth burdens interstate commerce in two respects: first, the appellant says that not only the convenience of the people, but also the convenience of the express company itself, demand that both interstate and local business be carried on by the same agency; that the organization of a Virginia corporation for the purpose of conducting the intrastate business is not a solution to this difficulty; and, further, that, if it were found advisable to obviate the difficulty of keeping two sets of books and two sets of records by consolidating the subsidiary corporation with the parent corporation, the Railway Express Agency, Incorporated, would then become a domestic corporation of both Delaware and Virginia and subject to the laws of both; second, the appellant argues that the effect of excluding the Railway Express Agency, Incorporated, from doing a domestic business in Virginia burdens interstate com-

merce in a fashion analogous to the burden imposed by a discrepancy between intrastate and interstate rates.

It cannot be conceived that any requirement imposed by a State on a corporation engaged in interstate and intrastate business will not have some remote effect on the interstate business of that corporation. Even the simplest form of license fee takes from the treasury of the corporation money which might be used in interstate commerce, but such requirement is not regarded as a burden on interstate commerce. Only that requirement which operates as an actual burden upon the interstate business of a corporation and as a hinderance to that corporation is regarded as unconstitutional and void.

The Railway Express Agency, Incorporated, has no inherent right to demand that the Commonwealth of Virginia permit it to do a domestic business therein certainly, if it do no such business, the Commonwealth of Virginia neither has the right nor does it seek to require anything of it for doing an interstate business therein; and it is not to be conceived that a State, which attempts to impose no conditions for the privilege of doing a domestic business, but simply says that no domestic business shall be done, can possibly be burdening interstate commerce. A burden presupposes some active requirement or regulation by a State of a corporation that seeks to do business within its borders. Here Virginia simply says that it will not permit a new foreign public service corporation to do any domestic business within her borders. It is not necessary to consider whether the convenience of those who engage in intrastate commerce will thereby be hampered, for no right under the Federal Constitution in relation thereto is secured to any person, and it will be time enough to consider that question when some shipper

raises it. *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 484. This agency, from which the State demands nothing, cannot raise the question that it would be more convenient for domestic shippers if it were given a certificate of authority to do domestic business, nor can it raise the objection that its interstate commerce is burdened when its sole objection to the policy of Virginia is found in the refusal of that State to prescribe conditions under which the Agency may carry on an intrastate business. Under no conditions can this corporation, as it now exists, do a domestic business in Virginia. It can become active in organizing a subsidiary and through that subsidiary domestic business in Virginia can be done, either separately or by consolidation; but the Railway Express Agency, Incorporated, *as it now exists,* cannot do a domestic business in that Commonwealth.

All the cases relied upon by the appellant bear out this theory. The taxes imposed by the States of Kansas and Arkansas in the statutes involved in *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra, and Ludwig* v. *Western Union Telegraph Co., supra,* all affected property outside of the State, used in interstate commerce, and were considered to burden that commerce. But there the State tried to exact something from the instrumentalities of interstate commerce as a price for conducting intrastate commerce. Here the State refuses to exact anything.

The extent of Federal regulation over intrastate commerce is not coextensive with that commerce; Federal regulation is not to be exercised in cases in which a State discriminates in favor of interstate commerce and against intrastate commerce; it is to be exercised only to prevent the enforcement of such State regulations as either dis-

criminate against interstate commerce, or actively operate to prevent the carrying into effect of Federal laws. For instance, in *Baltimore and Ohio Railroad Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, it was held that the Act of Congress, regulating the hours of service of interstate employees, could not be frustrated by the fact that those employees were engaged in both interstate and intrastate commerce. In *Southern Ry. Co.* v. *United States,* 222 U. S. 20, it was held that the amendment to the safety-appliance act was valid, even though its provisions were not confined to vehicles in interstate commerce, for the reason that both classes of traffic are moved in the same trains and the safety of interstate traffic is augmented by the use of the safety appliances on intrastate cars. In the *Employers' Liability Cases,* 207 U. S. 463, an Act of Congress regulating the liability of a railroad to its employees, whether State or interstate, was held unconstitutional, but in the *Second Employers' Liability Cases,* 223 U. S. 1, it was held that Congress could regulate the liability of a railroad to an interstate employee, even though he was injured by an intrastate employee.

This principle of the extent to which intrastate commerce is subject to the Federal law is fully borne out by the rate cases. In the first of those, the *Shreveport Case* (*Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 343), it was held that, if by the use of intrastate rates preference was given to certain persons and localities, those rates unjustly discriminated against interstate commerce. It was also held that, so far, but only so far, as State rates discriminated against persons and localities, they were void.

Subsequently, the Transportation Act of 1920, 41 Stat.

474, *et seq.*, was enacted. By its provisions the Interstate Commerce Commission was given the power to remove "any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" (section 13, paragraph 4); and in section 15a, paragraphs 2 and 3, the Commission was directed to regulate rates so as to assure an annual net railway operating income equal to a certain return upon "the aggregate value of the railway property." As a consequence, it was held in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, that a State not only was powerless to prescribe intrastate rates which, as to persons and localities, discriminated against interstate commerce, but that it was also powerless to prescribe rates which in no sense discriminated against persons and localities, but which rates were placed at so low a figure that of necessity interstate rates would have to be raised in order that the railroad might realize the determined profit, and it was therein said:

> ". . . Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work. The affirmative power of Congress in developing interstate commerce agencies is clear. . . . In such development, *it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce* it deems necessary or desirable. . . ."

It is to be noted that, pursuant to this language, a State is restricted only in the use it makes of the interstate carriers for intrastate commerce. This is far from supporting the view that the interstate carrier may compel the State to make use of it in intrastate commerce.

The *Minnesota Rate Cases,* 230 U. S. 352, are approved in the Wisconsin case as follows:

> ". . . '. . . This is not to say that the nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. . .' . . ."

These provisions of the Transportation Act, assuring to the railroads a certain net operating income, were determinative of the decision in *Colorado* v. *United States,* 271 U. S. 153, wherein it was held that the Interstate Commerce Commission had authority to authorize the abandonment by an interstate carrier of a branch line lying wholly within the State of Colorado, and it was pointed out that, if a State could compel an interstate carrier to operate at a loss a branch line within the borders of that State, interstate commerce would have to assist in making up the loss and would thereby be burdened.

It will be noted that these cases deal with the efforts of a State to regulate the intrastate business of a foreign corporation in such a way as to discriminate against persons and localities in interstate commerce, or in such a

way as to necessitate higher interstate commerce rates. Such efforts have been held to be unconstitutional; but here the State of Virginia attempts to impose no regulation at all on the Railway Express Agency, Incorporated. It is nowhere indicated that a foreign corporation must be allowed to do an intrastate business so that interstate business may profit thereby. It is further to be noted that these cases rest on the assurance of a certain net operating income. Such assurance, however, is confined solely to railway companies.

III.

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does not violate that provision of the Fourteenth Amendment to the Federal Constitution which prevents a State from denying to any person within its jurisdiction the equal protection of the laws.

(a) The benefits of that provision may be had by a foreign corporation only after permission to do an intrastate business has been granted.

In *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, it was said that "equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." It is, therefore, evident that, as a foreign corporation is not subject to the laws of a State until it has domesticated, no foreign corporation falls within the protection of this provision until that corporation has been granted authority to do business within the State.

In the case just cited the court was concerned with an act of the State of Alabama which imposed a tax upon foreign corporations, based on the amount of capital stock employed by them in the State, while a similar tax was not imposed upon domestic corporations. It was held that such a tax was unconstitutional in that it violated that portion of the Fourteenth Amendment referring to the equal protection of the laws. The court took occasion to speak as follows:

> "The argument on the part of the State of Alabama places much weight upon the cases in this court *which have sustained the right of the State to exclude a foreign corporation from its borders,* and to impose conditions upon the entry of such corporations into the State for the purpose of carrying on business therein. . . . It is sufficient for the present purpose to say that *we are not dealing with a corporation seeking admission* to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State . . . ."

Subsequently, this suggestion was fully developed and carried to its ultimate conclusion in the case of *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494, wherein it is said:

> ". . . With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and

> the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; *but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.*"

The Commonwealth of Virginia seeks not to place on a different basis a foreign express company which is lawfully doing an intrastate business in Virginia from that on which it places a domestic express company. It says to the newly organized foreign express company that it shall not enter, and, under the Fourteenth Amendment to the Constitution of the United States, the foreign express company, which is not entitled to the privileges and immunities of the citizens of the several States (*Pembina Con. Silver Mining Co.* v. *Pennsylvania, supra; Paul* v. *Virginia, supra*), is not deprived of the protection of any law of the Commonwealth of Virginia, the benefits of which it has the right to seek.

(b) No attempt is made, either directly or indirectly, by contract or otherwise, to deprive the Railway Express Agency, Incorporated, of its right to institute suits in the Federal courts, or to remove suits from the State to the Federal courts.

The appellant goes to great length in arguing the proposition, which for all time has been settled in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, that a State cannot, as a condition precedent to the issuance of a license to a foreign corporation to do an intrastate business within its borders, demand that the foreign corporation give up its right of resort to the Federal courts; nor can

it, after the corporation has been domesticated, revoke the license because the corporation avails itself of this right secured by the Federal Constitution.

The Commonwealth of Virginia is unable to perceive the pertinence to the instant case of this settled principle of constitutional law. It does not seek to force the appellant to give up this right as a condition of bestowing upon it the privilege of doing a domestic business within Virginia. It says to the appellant that under no conditions can it do a domestic business within Virginia. The appellant, if it sees fit, may avoid the field of Virginia intrastate business, or it may organize a Virginia subsidiary and that Virginia subsidiary may do business therein, but, if the appellant so elects to do, it may still avail itself of the right, so far as any statute in Virginia is concerned, to institute suits in the Federal courts, or to remove cases thereto. If the appellant thereafter should consolidate with its Virginia subsidiary, that new consolidated company could not institute or so remove suits, but that new consolidated company will not be the appellant. It will be in part a creature of Virginia and a domestic corporation thereof, for its very existence will be founded upon the action of the Commonwealth of Virginia in creating it.

(c) That interpretation results in no unreasonable classification.

It is sought to argue that, since in 1918 the American Railway Express Company, a foreign corporation, was granted a certificate to do an intrastate business in Virginia, and since in 1921 the Southeastern Express Company, an Alabamian corporation, was granted such a cer-

tificate, it is now a violation of the Federal Constitution for Virginia to withhold such a certificate from the Railway Express Agency, Incorporated. It was pointed out by Mr. Epes, Chairman of the State Corporation Commission of Virginia, in his opinion (R. pp. 229-230) that the Commission gave no reason for allowing the certificate to the American Railway Express Company and for altering the view it held in 1914 when it refused a similar application from Wells, Fargo and Company; but it may well be that his suggestion that the reason of the Commission in so allowing the certificate on July 26, 1918, was that on that date the Director General of Railroads was operating the American Railway Express Company as a Federal agency.

The State Corporation Commission took the view in 1921, when a certificate was given to the Southeastern Express Company, that the State of Virginia was compelled, despite its constitutional provision, to allow a foreign interstate commerce carrier to do an intrastate business. As was pointed out by the Supreme Court of Appeals of Virginia in its decision in this case found in 153 Va. 498, and found on pages 244-253 of the record, the Corporation Commission erred and "erroneously granted the certificate of authority."

It is a novel doctrine that a lower judicial body, having erred in one instance, is thereafter for all time forced to fly in the face of the fundamental law governing it and violate that law at the demand of a foreign corporation which has no right in the premises to do an intrastate business within the State. And it is an even more novel doctrine that a lower tribunal by its error in one case can bind an appellate tribunal in all similar cases which may thereafter be brought to that higher body. The doc-

trine of *stare decisus* is not to be used as a lever to perpetuate error. This court so held when, in *Terral* v. *Burke Construction Co.*, *supra*, it reversed the doctrine announced in *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246. Surely the Commonwealth of Virginia is not to be bound for all time and in other similar instances when on one occasion its Corporation Commission has erred.

CONCLUSION

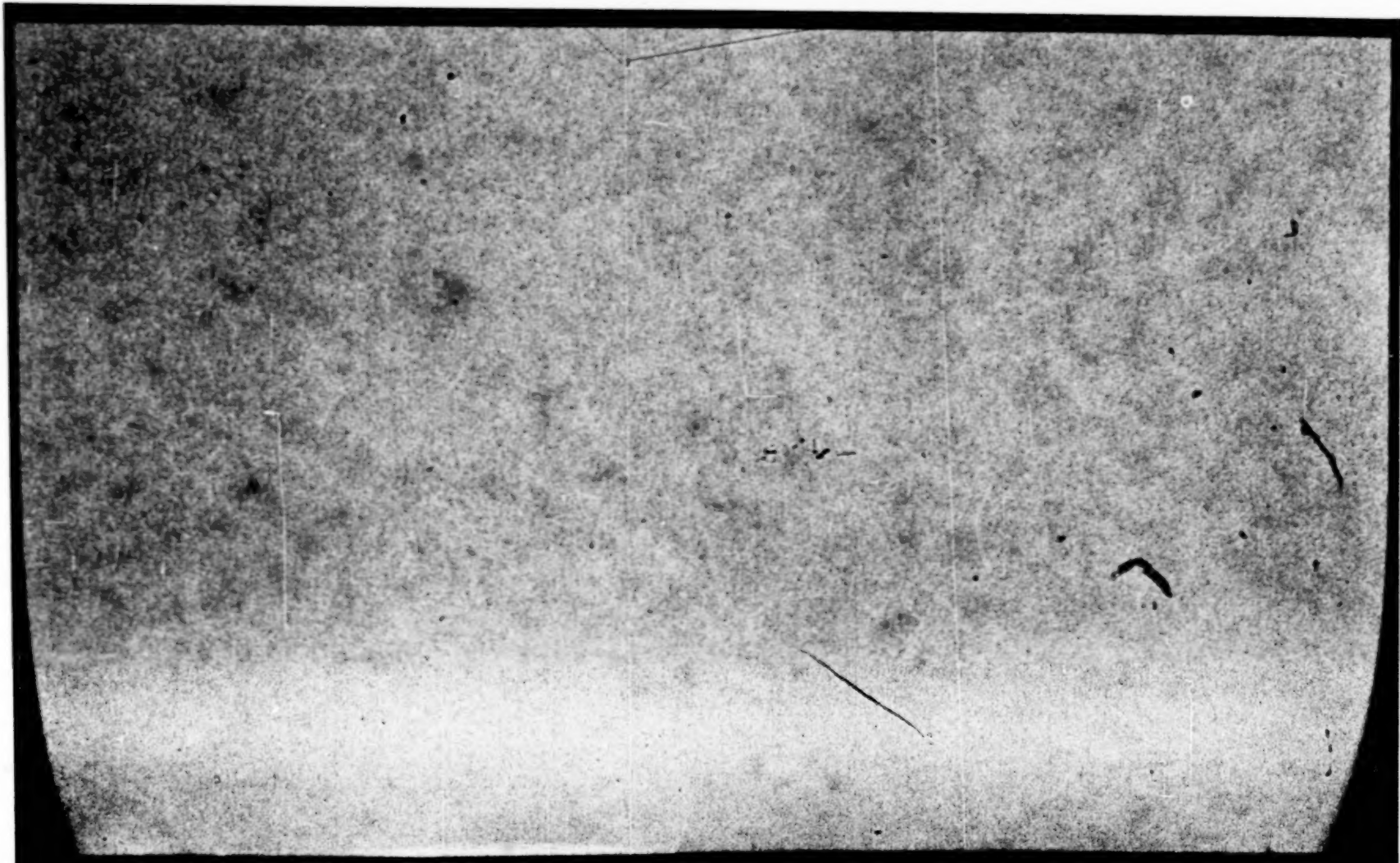
That other States have granted to the appellant the right to do an intrastate business within their borders, that the appellant will do many millions of dollars worth of business, and that Virginia intrastate express business is a relatively small matter, are considerations of no importance in the determination of the question involved. The question is solely whether a State may determine what artificial creatures may engage in a domestic business within its borders. Heretofore the right of a State to so determine has been unquestioned. Its sovereignty over its internal concerns, a sovereignty to be exercised as it sees fit within the limits of the Federal Constitution, entitles it to the unrestrained exercise of the course its people have determined to be advisable.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA.

By JOHN R. SAUNDERS,
Attorney General.

EDWIN H. GIBSON,
COLLINS DENNY, JR.,
Assistants Attorney General.



SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1930.

Railway Express Agency, Inc., Appellant,
vs.
The Commonwealth of Virginia.

Appeal from the Supreme Court of Appeals of the State of Virginia.

[February 2, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Appeals of Virginia affirming an order of the Corporation Commission that denied to the appellant a certificate of authority to do an intrastate express business in Virginia. 153 Va. 498. The appellant was incorporated in Delaware, in December, 1928, and was given by its charter not only power to engage in international, interstate and intrastate express business, but other most extensive ones to own personal and real property and to engage in other collateral undertakings. Its stock was to be owned by railroad corporations. It has bought the business and assumed the liabilities of the American Railway Express Company, and is an agency of railroads throughout the United States. The appellant's right to do interstate business is not questioned, but it was held by the Supreme Court of Appeals that being a foreign corporation created since the Constitution of the State went into effect in 1902, it was prohibited by that instrument from doing intrastate express business by the plain words of section one hundred and sixty-three. The appellant says that so construed the prohibition is a direct burden upon the interstate commerce which is its principal business, and therefore is void. It also invokes the Fourteenth Amendment for some help.

There is not here, as there was in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Pullman* v. *Kansas*, 216 U. S. 56, a deliberate attempt to use the State's powers as the means for attaining the unconstitutional result of taxing property outside

the State. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce and it is presumed to be constitutional. *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, January 5, 1931. We may add that as suggested by the State Court the difficulties created by the Constitution of Virginia probably will prove hard to overcome when it is found that they must be met.

The objection based on the Fourteenth Amendment is that the requirement of the Virginia Constitution deprives the appellant of its right to sue in the federal courts and to remove suits to them on the ground of diversity of citizenship. This plainly is inaccurate. The appellant is not deprived of any rights. It can do all that it ever could. If it sees fit to acquire a new personality under the laws of Virginia it cannot complain that the new person has not the same rights as itself. Of course there can be no suggestion here that the clause in the State Constitution was adopted for a sinister end. And, unless it was, the inability of the new State corporation to do all that the appellant could have done is only the legitimate incident of a legitimate act.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.